Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ALLAN C. ALDRIDGE, DENNIS W. PETERSON and HENRY A. SIERON,

Petitioners,

v.

LILY-TULIP, INC. SALARY RETIREMENT PLAN BENEFITS COMMITTEE and FORT HOWARD CUP CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID E. HUDSON
(Counsel of Record)
WILLIAM F. HAMMOND
HULL, TOWILL, NORMAN & BARRETT, P.C.
Suite 700 – Trust Company Bank Building
801 Broad Street
Augusta, GA 30901
(706) 722-4481

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. ERISA §204(g), as amended by the Retirement Equity Act of 1984, unconditionally prohibits the cut-back of accrued benefits upon a plan's amendment or termination. May the protections of ERISA §204(g) be conditioned on compliance with the lesser requirements under ERISA Title IV, or interpreted in a manner which renders them meaningless and the statute's prohibitions unenforceable by participants in the Federal courts under ERISA §502(a)(3)?

2. The Court of Appeals held the participants' accrued benefits were reduced pretermination but the employer complied with all of the requirements for a standard termination under ERISA Title IV. May an employer cure its 1986 ERISA §204(g) violations in part and noncompliance with the requirements of ERISA Title IV by amending its plan in 1989 retroactively to 1986?

PARTIES TO PROCEEDINGS

Petitioner does not have any knowledge of the current existence or status of Fort Howard Cup Corporation, respondent, since all discovery in this case was stayed by the district court at respondent's request. Fort Howard Cup Corporation has been a party to several business reorganizations since 1986. Respondent's counsel has indicated in court that some existing corporation continues to be liable, which we believe may be Sweetheart Cup Company, Inc. This should be appropriately clarified by respondent in subsequent filings with the Court.

Petitioner(s) are representatives of a class of approximately 525 participants certified by the district court pursuant to FRCP Rule 23.

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OPINIONS IN THE CASE

(1) *Aldridge v. Lily Tulip, Inc. Salary Retirement Plan Benefits Committee,* 741 F. Supp. 906 (S.D. Ga. 1990). Civil Action No. 187-084 Consolidated. ERISA Class Action. Jurisdiction: 29 U.S.C. §1132 (ERISA §502).

(2) Brief of Amicus Curiae Pension Benefit Guaranty Corporation, December 10, 1990, filed in 11th Circuit Court of Appeals in Interlocutory Appeal No. 90-8686.

(3) *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee,* 953 F.2d 587 (11th Cir. 1992). Appeal No. 90-8686. Jurisdiction: Interlocutory Appeal under 28 U.S.C. §1292(b).

(4) *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee.* CV 187-084. Unpublished Order. Dated September 14, 1993 and Judgement entered on September 15, 1993 by the U.S. District Court for the Southern District of Georgia – Augusta Division.

(5) Brief of Amicus Curiae Pension Benefit Guaranty Corporation, January 5, 1994, filed in 11th Circuit Court of Appeals, Appeal No. 93-9235.

(6) *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee,* 40 F.3d 1202 (11th Cir. 1994). Appeal No. 93-9235. Jurisdiction: Rule 54(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §1291.

(7) *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee,* Order denying Petition for Rehearing and Suggestion of Rehearing En Banc. Appeal No. 93-9235. June 30, 1995.

JURISDICTION

This Court has jurisdiction to review the decisions of the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. §1254(1). An order of the Eleventh Circuit denied rehearing on June 30, 1995 and this Petition was timely filed pursuant to Supreme Court Rule 13 within 90 days thereof.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions and regulations are lengthy and are reprinted verbatim in the appendix pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

Aldridge is an ERISA class action and the district court's jurisdiction lies in 29 U.S.C. §1132, ERISA §502. The facts below are recited in the opinion of the Court of Appeals. (A-3-6). The facts in brackets were added by Petitioner. The length of this Petition is necessarily a result of these complex facts, statutes and proceedings.

In October 1986 Lily-Tulip, Inc.'s ("Lily") Board of Directors (the "Board") voted to amend and then terminate the Lily-Tulip, Inc. Salary Retirement Plan ("the Plan"). On October 30, 1986 the Board adopted several resolutions by unanimous written consent. One of these resolutions, Resolution II, stated that the Plan would

terminate on December 31, 1986[1] [after the reduction in benefits by Amendment No. 2]. The employees allege that the Plan termination eliminated the employees' contingent subsidized early retirement benefits. [Accrued benefits were also reduced by approximately $3,500,000 in addition to the elimination of $4,000,000 in retirement subsidies.] At the time Lily undertook to terminate the Plan, the Plan was underfunded. [The purpose of these understatements was to reduce Lily's funding obligations under Plan §6.2].

On the same date that the Board adopted the resolution to terminate the Plan, the Board also adopted a resolution calling for the amendment of the Plan. The amendment, Amendment No. 2, effectively reduced accrued benefits.[2] [Amendment No. 2 was proposed, but never adopted as part of the plan document.] For Plan participants under age 55, benefits were reduced by changing the calculation of the social security offset in the

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[1] The resolution reads as follows:

II. Termination of the Retirement Plan

WHEREAS, The Corporation deems it desirable to terminate the Retirement Plan after the above amendment; NOW THEREFORE BE IT RESOLVED, That the Retirement Plan be and hereby is terminated effective December 31, 1986, subject to the issuance of a determination from the IRS that the Retirement Plan remains a qualified plan under Section 401 of the Internal Revenue Code upon its amendment and termination.

(R. 11-92, Ex. B.)

[2] On December 23, 1986. Lily revised Amendment No. 2 to clarify its wording. The Clarification did not substantively change the effect of the amendment.

Plan's benefit formula for active employees.[3] [This reduction was accomplished by arbitrarily assuming all employees terminated employment, which then permitted the higher offset under Plan §1.33(c) to be employed in benefit calculations. This social security reduction of approximately $2,500,000 resulted from the termination and was not part of the proposed Amendment No. 2]. The employees also contend that the amendment reduced optional lump sum benefits by changing the actuarial interest rate [commencement dates] and mortality assumptions used in calculating benefits.[4]

Lily notified the employees of the proposed termination on October 24, 1986, more than sixty days before the proposed termination date on December 31, 1986. Sixty-one days prior to the proposed termination date Lily sent the employees another letter to bring the employees up to date on the status of the Plan termination and to provide

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[3] Benefits were reduced by effectively changing the Plan section under which these participants' Primary Social Security (PSSB) was calculated. Specifically, the amendment caused these participants' PSSB to be calculated under Plan section 1.33(c) instead of 1.33(b). This change from 1.33(b) to 1.33(c) had the effect of increasing the social security offset, thereby reducing the participants' benefits under the Plan.

[4] The employees contend that under the Plan, normal retirement benefits were paid as a life annuity. However, the Plan participant had the option of choosing a lump-sum payment. The lump-sum present value of the retirement annuity was determined by using certain actuarial interest rate and mortality assumptions. Amendment No. 2 changed the mortality tables [commencement date and interest rate assumptions] to be used. By so doing, the participants assumed life expectancy was effectively reduced, thereby decreasing the lump-sum benefit.

the employees with additional information about their benefits. In addition, on October 31, 1986, Lily sent the employees a notice detailing the definitions and assumptions that would be used in determining each employee's benefits under the terminated Plan. The notice incorporated the changes mandated by Amendment No. 2, [and the social security changes], but did not inform the employees that an amendment to the Plan had been either proposed or adopted, [or that their retirement subsidy benefits were eliminated and their normal retirement and optional forms of benefits were not calculated in accord with the terms of the Plan document]. Along with the letter and notice, each employee received a benefit election form which described the benefits the employee was to receive and allowed the employee to choose the annuity or lump sum form of payment. [These benefits choices were understated by 20-50% via the social security changes and the reductions in Amendment No. 2, even ignoring the value of the subsidized early retirement benefit which was eliminated.] Lily submitted the termination and amendment documents to the Pension Benefit Guaranty Corporation ("PBGC") for review pursuant to 29 U.S.C. §1341. Lily also submitted the documents to the Internal Revenue Service ("IRS"), requesting a determination from the IRS that the Plan would continue to retain its tax-qualified status. [Lily misrepresented to the I.R.S. on Form 5310 Q&A 10(g) that no accrued benefits were reduced by amendments or upon the plan's termination. (A-68, N.10).] The PBGC had no problem with the Plan termination [even though the notices of benefit entitlements to participants understated benefits by 20-50%, the plan's actuarial certification

understated the Plan's total liabilities by approximately $7,500,000, and the plan administrator's certification as to accuracy was false,] and granted Lily an extension for the distribution of Plan assets [and understated benefits] pending the IRS's issuance of a letter of determination. (A-84-5). The IRS expressed several concerns [as a result of participants' interested party complaints] with the termination and amendment of the Plan, including the amendment of the mortality [and other actuarial] assumptions and the social security offset. On July 28, 1989, in response to IRS concerns, Lily proposed to adopt Amendment No. 3 which would alleviate IRS concerns regarding Amendment No. 2 [and the social security changes.] The IRS issued a favorable determination ruling subject to the adoption of Amendment No. 3 [and advised the Petitioner that under *Rev.Rul.* 70-315, 1970-1 C.B. 91, it lacked the authority to enforce on behalf of the participants the employer's funding obligations for subsidized retirement benefits in Plan §6.2 or promise not to eliminate such benefits in Plan §8.1.] Amendment No. 3 was adopted in 1989 and made retroactive to December 31, 1986.[5]

[The PBGC filed amicus briefs against the employees in both 1992 and 1994 and misrepresented that Lily complied with all of the requirements for a standard termination under ERISA Title IV in 1986, even though Lily failed to provide participants notice of all of their "benefit

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[5] A more detailed description of the underlying facts appears in the district court's first order, *Aldridge v. Lily-Tulip, Inc.*, 741 F. Supp. 906 (S.D.Ga.1990), and [the] opinion on interlocutory appeal, *Aldridge v. Lily-Tulip, Inc.*, 953 F.2d 587 (11th Cir.1992).

entitlements"[6], since they were understated by 20-50%. The Court of Appeals in 1992 adopted the PBGC's misrepresented facts concerning Lily's Title IV compliance in 1986 and its view that the right to benefits is determined exclusively by reference to the asset allocation provisions of ERISA §4044 in a terminated plan. Because the subsidized early retirement benefits ("SERB") protected as accrued benefits by ERISA §204(g) were category (6) benefits under ERISA §4044, and the plan did not have sufficient assets allocable to category (6), the employee's right to this accrued benefit could be eliminated under Title IV. Likewise, the employees' contractual claims under Plan §6.2 (to enforce the employer's funding obligations) and §8.1 (to enforce the employer's ERISA §204(g) promise not to eliminate such retirement subsidies), and its statutory claims to enforce the prohibitions of ERISA §204(g) were without merit, because the right to benefits upon a Plan's termination is determined solely by reference to ERISA Title IV §4044's asset allocation provisions. The PBGC also argued ERISA §4044 category (6) benefits were protected, if at all, by I.R.C. §411(d)(3), which vests benefits to the extent funded upon termination. (A-139-53).]

[In 1994 the Court of Appeals was advised that the PBGC had filed an amicus brief in the Third Circuit on behalf of the employees, which was inconsistent with its

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[6] "Benefits Entitlements" are defined in the '86 SEPPAA Legislative History to ERISA §4001 P.L. 99-272 and the notice and other requirements are discussed in the Legislative History to §4041. *See*: ERISA §4041(b) and H.R. Rep. No. 99-241 99th Cong., 2d Sess., *reprinted in* 1986 *U.S. Code & Ad. News* vol.4, 685, 940-48.

position in *Aldridge*. In *Murphy v. Heppenstall*, 653 F.2d 233 (3rd Cir. 1980) the employees sued the employer directly for benefits promised, not funded, and in excess of those payable to the PBGC under Title IV. The PBGC argued that nothing in Title IV was intended to preclude the employee from recovering such excess benefits contractually promised by an employer. In 1994 the Court of Appeals was also advised of its own decision in *Smith v. National Credit Union Admin. Bd.*, 36 F.3d 1077, 1081 (11th Cir. 1994) which prohibited any amendment from being given retroactive effect prior to the date of its formal adoption.]

[The Court of Appeals continued to give deference to the PBGC's 1992 and 1994 amicus positions, even though it misrepresented Lily's compliance with Title IV in 1986 and was inconsistent with *Murphy*. The Court also upheld the employer's 1989 Amendment No. 3, made retroactive to December 31, 1986, inconsistently with *Smith*.]

[The Court of Appeals in deference to the PBGC's misrepresentations of facts[7] and inconsistent positions has approved a termination which has never complied with the notice and other procedural requirements for a standard termination under Title IV §4041(a) and (b), and even after the 1989 restoration of $3,500,000 in 1986 benefit reductions, continues to eliminate and refuse to pay over $4,000,000 in retirement subsidies secured by ERISA

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[7] Petitioner has filed a complaint with the Inspector General of the PBGC which alleges the PBGC unethically misrepresented the fact of Lily's compliance with Title IV in 1986 to the 11th Circuit, which the PBGC knew was false and could not be supported by any admissible evidence.

§204(g) to participants who met or may meet the conditions for the subsidy on the dates of their retirement.]

REASONS FOR GRANTING THE WRIT

1. *The Decisions Below are Contrary to the Plain Meaning of ERISA §204(g), and Construe the Statute Inconsistently with Decisions of this Court, Applicable Treasury Regulations, and Congressional Legislative Histories.* ERISA §204(g) was amended by the Retirement Equity Act of 1984 ("REA") to unconditionally prohibit the cut-back of accrued benefits upon a plan amendment or by a terminated plan. The only exception incorporated therein is one for hardship by an insolvent employer under §302(c)(8). ERISA §204(g) is not a direct funding provision, but a limitation on the reserved *power* of an employer to amend or terminate its Plan. *Bencivenga v. Western Penn Teamsters and Employees Pension Fund*, 763 F.2d 574, 583 (3rd Cir. 1985). If a post REA termination or amendment has the prohibited "effect" of reducing accrued benefits, it "shall not take effect." *See*: ERISA §302(c)(8).

No funding condition to the right to receive an accrued benefit protected by Title I has been permissible since the effective date of ERISA in 1976. *Nachman v. PBGC*, 446 U.S. 359, 365 and 373 n. 19 (1980). The prohibition against conditioning the right to benefits protected by ERISA §204(g), and its mirror image in I.R.C. §411(d)(6), to the extent of a plan's funding is clearly set forth in Treas. Reg. §1.411(d)-4 Q&A6. The Court of Appeals is bound by this construction of I.R.C. §411(d)(6) in these post REA Treasury Regulations in interpreting

the corresponding provisions of ERISA Title I §204(g). *See*: 29 U.S.C. §1202(c). The REA legislative history likewise makes it clear that these prohibitions apply to terminated plans without exception. S. Rep. No. 98-575, 98th Cong., 2nd Sess. (1984) *reprinted in* 1984 *U.S. Code Cong. & Ad. News* 2547, 2577.

The Court of Appeals in 1992 and 1994 ignored the plain and unconditional terms of ERISA §204(g), incorporated therein a funding condition not located in the four corners of Title I, ignored applicable Treasury Regulations, and construed this provision inconsistently with the sole purpose of ERISA, which is to insure that if a worker has been promised a benefit upon retirement (such as a SERB) and if he fulfills whatever conditions are required (age and service), he actually receives it. *Alessi v. Raybestos-Manhattan*, 451 U.S. 504, 510 (1981). When a statute is as clearly unconditional as ERISA §204(g), it should be so construed. *Demanrest v. Manspeaker*, 498 U.S. 184, 191 (1991). To interpret it otherwise would effectively render portions thereof meaningless, as explained hereafter, and misconstrue the mandate of *Mead v. Tilley*, 490 U.S. 714, 723 (1989) that the right to benefits is secured by the carefully crafted provisions of Title I and not diminished or conditioned by the allocation provisions of ERISA §4044 in Title IV.

2. *The Decisions Below were Based on Deference to the Views of the Pension Benefit Guaranty Corporation ("PBGC") Asserted for the First Time in this Case, which are both Inconsistent with the PBGC's Prior Position in Another Court of Appeals and Based on Intentional Misrepresentations of the Facts.* The PBGC filed amicus briefs against the employees in 1992 and 1994 (A-132 and A-76), which

were adopted by the Court of Appeals. The PBGC argued that §204(g) applies to terminations, but the employer had no obligation to fund subsidized benefits protected as accrued benefits by §204(g), because they are category (6) benefits under ERISA §4044 (A-145-53). Title IV, as amended in 1986 by SEPPAA, did not impose any liability on the employer *to the PBGC* for such benefits if they were not funded. In other words, subsidized retirement benefits are conditionally protected as accrued benefits by Title I, only to the extent of the Plan's funding.

However, the PBGC not only misrepresented the fact of Title IV compliance to the Court of Appeals, it also changed its prior amicus position in *Murphy v. Heppenstall*, 635 F.2d 233 (3rd Cir. 1980) by asserting that a participant's right to a benefit was limited only to the extent such benefit was funded and payable to the PBGC under Title IV. The PBGC in *Murphy* asserted that *nothing* in ERISA Title IV was intended to preclude the recovery of greater benefits promised by the Plan of a solvent employer. The position adopted by the Court of Appeals, is not only inconsistent with *Murphy*, but is also the opposite of the well reasoned construction given ERISA in *M&M Transport*, 3 B.R. 722, 727-8 (SDNY 1980), which granted the nonunionized participants' claims for benefits promised in excess of those guaranteed and payable to the PBGC under Title IV and not funded. *See, also, Haytcher v. ABS Industries, Inc.*, 889 F.2d 64, 67-9 (6th Cir. 1989), *United Steel Workers v. North Bend Terminal*, 752 F.2d 256, 259 (6th Cir. 1985) and *Grimes v. Dayton-Walther Corp.*, 680 F. Supp. 1110, 1117 (S.D. Ohio 1987). A position first asserted by an agency in an appellate brief and inconsistent with its prior position and the plain meaning

of the statute is entitled to no deference. *John Hancock Mutual Insurance Company v. Harris Trust Saving Bank*, 510 U.S. ___, 126 L.Ed.2d 524, 545 (1993). In fact, and consistent with the PBGC's position in *Murphy* and *M&M Transport*, the 1986 SEPPAA Title IV legislative history provides –

> The Committee expressly states that nothing in this legislation changes the obligations of plan sponsors under §411(d)(6) of the I.R.C. and §204(g) of ERISA (as amended by §301 of REA, P.L. 98-397 Aug. 23, 1984). H. Rep. No. 99-300, 99th Cong., 2nd Sess. (1986), *reprinted in* 1986 *U.S. Code and Cong. Ad. News*, vol.4, 810, 947.

3. *The Decisions Below Construe ERISA Titles II and IV in a Manner which Renders the Protections Afforded Accrued Benefits Under ERISA Title I Meaningless and Contrary to the Decision of this Court in Mead v. Tilley and Other Courts of Appeal.* If a SERB (protected as an accrued benefit by ERISA §204(g) since 1984) is a category (6) benefit under ERISA §4044(a)(6), and is payable upon termination only if there are sufficient assets allocable to this category, then the addition of a SERB as a protected accrued benefit under ERISA §204(g) in 1984, and mandating §204(g)'s application to terminations without exception, would not have changed the law, since even prior to 1984, a SERB was payable under the allocation provisions of ERISA §4044 in Title IV only if they were funded. This construction of the ERISA Title IV allocation provisions would render the protection of such SERB by the 1984 REA amendments to ERISA Title I §204(g) meaningless and provide no relief for this prohibited cut-back inconsistently with *Mead*, which remanded a pre-REA termination

case to the Court of Appeals with instructions to determine if accrued benefits were reduced under ERISA §204(g). *Supra at* 726. Nowhere does *Mead* imply that this determination should be made based on the extent to which the plan was funded, or by reference to ERISA Titles II or IV. (A-33-39).

The PBGC and the 11th Circuit also misconstrue the provisions of Internal Revenue Code ("I.R.C.") §411(d)(3), enacted as part of the Code in 1962, and not restated in ERISA Title I in 1974, as a forfeiture condition (A-152-3, A-37, A-66). The limited purpose of the I.R.C. §411(d)(3) requirement to vest employees to the extent funded upon a plan's termination was to prohibit reversions in the termination of overfunded plans for tax policy reasons. Tax provisions required to be incorporated in a plan for qualification purposes generally do not bear on the interpretation of the plan in determining a participant's right to benefits. *Tipton v. Kalmbach, Inc.*, 83 T.C. 154, 160 (1984); *United Steel Workers of Amer. v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1297-9 and N.25 (3rd Cir. 1983). The 11th Circuit and the PBGC by application of this tax provision in effect incorporate a funding condition into ERISA §204(g), even though funding was eliminated as a permissible forfeiture condition in 1976 in Title I upon the enactment of ERISA. *Nachman, supra at* 373 N.19. I.R.C. §411(d)(3) affects the tax treatment of the plan. It does not limit the payments of benefits only to the extent funded. *Baum v. Nolan*, 853 F.2d 1071, 1076-7 (2nd Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989).

ERISA §204(g) protects accrued benefits from elimination whether or not they are vested or then payable. *Hoover v. Cumberland Md. Area Teamsters Pen. Fund*, 756

F.2d 977, 984 (3rd Cir. 1985). If I.R.C. §411(d)(3) is a permissible forfeiture condition applicable to benefits deemed accrued by Title I, then such benefits would not be definitely determinable, but subject to the discretion, of employers, via the extent of funding. This is why Treas. Reg. §1.411(d) – 4, and specifically Q&A 6 therein, prohibits the employer's discretion to condition the right to a benefit protected by §411(d)(6), such as a SERB, to the extent of a plan's funding. Otherwise, the actuarial risk in a defined benefit plan would be shifted to employees. The shifting of such actuarial risk by the solvent employer in *Aldridge* to participants would be inconsistent with the 2nd, 3rd, 7th, and 11th Circuits' holdings that the adoption of a defined benefit plan exposes the employer's and the plan's assets to a liability to the employees. *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505-6 (2nd Cir. 1995); *Murphy, supra at* 237-40; *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994); and *Blessitt v. Retirement Plan for Employees of Dixie Eng.*, 848 F.2d 1164, 1177 (11th Cir. 1988). A solvent employer's liability to employees is derived from its contractual plan promises, protected by ERISA §204(g) from repudiation, and is not extinguished by a termination, the provisions of Title IV or Title II in I.R.C. §411(d)(3). The SEPPAA legislative history provides –

> The intent of ERISA is that solvent employers pay for the benefits promised to their employees and that termination not end this responsibility. H. Rept. No. 99-241, Part 2, 99th Cong. 2nd Sess. (1986) *reprinted in* 1986 *U.S. Code Cong. Ad. News*, 685, 690.

4. *The Decision Below Inconsistently made Two Holdings which are Impossible – i.e., that (i) the Participants' Accrued Benefits were Illegally Reduced Pretermination, but (2) the Termination Strictly Complied with All of the Provisions for a Standard Termination under ERISA Title IV.* The Eleventh Circuit's own opinion in 1994 is internally inconsistent. The Court, obviously confused by the PBGC's inconsistent positions and misrepresentations, inconsistently holds that the employer's plan amendments reduced the employees' accrued benefits pretermination, but the termination is a separate and distinct event and the employer fully complied with the requirements for a termination under Title IV. (A-19 and A-22, and A-15-16). If the accrued benefits were reduced upon or before termination, it would then be impossible to provide to participants *all* of the "benefit entitlements" under the terms of the Plan on December 31, 1986, or proper actuarial and administrative certifications to the PBGC, as required by ERISA §4041(b) to complete a standard termination under SEPPAA.[8] A plan may not be terminated until the employer strictly complies with these procedures under ERISA §4041. *Phillips v. Bebber*, 914 F.2d 31 (4th Cir. 1990) (A-90, N.4).

Also, the termination standing alone would have had the prohibited effect under the erroneous separate and distinct analysis by the Circuit Court in 1994, since benefits were reduced by unwritten social security changes, even if the separate written Amendment No. 2 had not

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[8] See: Note 6 and the SEPPAA Legislative History for these requirements.

been proposed. The Court of Appeals' separate and distinct analysis of amendments and terminations, and its definition of "termination" as only reducing benefits prospectively, would in fact render the application of ERISA §204(g) to terminations impossible in any fact pattern, because no benefit reduction could ever result from a "termination" so defined in any termination context. (A-19).

5. *The Decision Below Looks to Congressional Amendments to ERISA Title IV in 1987 to Determine the Intent of Congress' Title I Amendments in 1984 Inconsistently with this Court's Decision in Mackey v. Lanier.* The Court of Appeals in 1992 also concluded that ERISA §204(g), as amended in 1984 to limit the employer's *power* to terminate a plan, whether the accrued benefits were funded or vested, or not, was unenforceable because ERISA Title IV was not amended to require the funding of ERISA §4044(a)(6) benefits to the PBGC until the enactment of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987) ("1987 Act"). (A-37-39). This is exactly the type of statutory construction this Court rejected in *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 840 (1988). A court may not look to an enactment by Congress under ERISA Title IV in 1987 to determine the intent of amendments by Congress to Title I in 1984. Otherwise, one may give no meaning to the statute, as was done in this case, even though no funding or other applicable conditions to benefits protected by ERISA §204(g) existed in 1984 or 1987 in Title I.

6. *The Decision Below Erroneously Permitted the Employer in 1989 to Amend its Plan Retroactively to 1986 Even Though such Retroactive Amendments are Contrary to a*

Decision of the Court of Appeals and the Prohibitions Against such Amendments in ERISA Title I and Other Courts of Appeal. The Court of Appeals approved the 1989 Amendment No. 3 which was made retroactively effective to 1986. (A-6 and A-22). Permitting an employer to amend a Plan retroactively to 1986 in 1989 eliminates the certainty mandated by the written plan requirements of ERISA §402(a) and will actually encourage employers to abuse participants. The employees had no way of determining their benefits under the plan after 1986, because the PBGC permitted these benefits to be calculated under a proposed Amendment No. 2, which understated the participant's accrued benefits, and was never adopted as part of the Plan. (A-59-63).

In this case the Court of Appeals refused to recognize the remedy, i.e., voiding the termination as granted by the district court, for violations of ERISA §204(g)'s prohibitions in 1986 via accrued benefit reductions (A-55-59, and 63-68, 70-1). These benefit understatements were not separate and distinct, but an integral part of the termination. If the termination is not void under ERISA §204(g) in 1986 as a result of such illegal conduct, then employers will be encouraged to understate benefits in a termination. If the employer is caught, all it has to do is retroactively amend the plan and correct the understatement without any detriment. Permitting the retroactive application of 1989 plan amendments to partially cure ERISA Title I, and apparently the Title IV violations in 1986, is not only inconsistent with the Court of Appeals' recent decision in *Smith v. National Credit Union Admin. Bd.*, 36 F.3d 1077, 1081 (11th Cir. 1994) prohibiting such retroactive amendments, it is also inconsistent with

ERISA §302(c)(8) which prohibits retroactive amendments which reduce accrued benefits. *Collins v. Seafarers Pension Trust*, 846 F.2d 936, 938-40 (4th Cir. 1988); *Production Maintenance Employees Local 504 v. Roadmaster Corp*, 954 F.2d. 1397, 1403-4 (7th Cir. 1992). The employer's Amendment No. 3 in 1989 continued to eliminate the Plan's SERB by conditioning the right to such benefit only to the extent the employer had an obligation to pay such benefits to the PBGC under ERISA Title IV, repudiated the funding obligations to employees under Plan §6.2 and breached its promise not to reduce any retirement subsidy under Plan §8.1 via amendments or upon termination of the Plan. (A-66-68).

7. *The Deference Accorded the PBGC's Views, as Instructed by this Court in Mead v. Tilley, was not Only Misconstrued, but Enlarged by the Court of Appeals Inconsistently with Congressional Intent to the Extent that Participants' Rights under ERISA Title I were Rendered Unenforceable.* This Court in *Mead* instructed the lower courts to give deference to the PBGC's and I.R.S.'s views on terminations. Id. p. 726. The PBGC views this command as the right to interfere in the exercise of a participant's statutory and contractual rights under the Plan and Title I. This view is clearly inconsistent with that of Congress in the SEPPAA legislative history, that the PBGC is not (and should not be) in a position to determine whether a proposed termination violates the contractual and statutory rights of any affected party and should not interfere in the exercise of these rights, even if the remedy rescinds the termination. This history also provides that in adopting SEPPAA Congress did not intend to make any substantive change in the law governing the contractual or statutory rights of any affected

parties or the remedies which may be granted by a Court. 1986 *U.S. Code Cong. & Ad. News* at 944-6. Instead, the PBGC erroneously asserts that the participants' contractual claims under Plan §§6.2 and 8.1, and attempts to enforce ERISA §204(g)'s (I.R.C. §411(d)(6)'s) prohibitions in the federal courts pursuant to ERISA §502(a)(3) are without merit and preempted by Title IV. (A-141-2). *See*: *Rev.Rul.* 76-378, 1976-2 C.B. 12 §§1.-2., to the contrary.

Mead surely does not stand for the proposition that deference to a federal agency's views operates to rescind a participant's right to insist on strict compliance with the terms of a Plan and Title I. If the deference accorded by *Mead* is not more narrowly defined by this Court, ERISA Title I enforcement will be replaced by judicial deference to an agency with no regulatory authority over Title I, and Title I actions in the context of a termination will be rendered a useless exercise in futility.

This is especially bothersome in this case because the PBGC regulates and did not even insist on strict compliance with Title IV of ERISA, which compliance it contends is required to terminate a pension plan. (A-90, N.4). Such enlarged deference beyond the agency's authority has the indirect effect of eliminating ready access to the federal courts and appropriate relief under ERISA Title I. Certainly this is not what Congress or this Court in *Mead* intended. Interference by the PBGC in Title I cases after *Mead*, such as *Aldridge*, has resulted in the PBGC usurping the statutory and contractual rights of participants and the jurisdiction of the federal courts granted by Title I inconsistently with Congressional intent.

CONCLUSION

The lower federal courts generally are in dire need of this Court's supervisory direction on the appropriate construction of ERISA and the extent to which deference should be accorded to the PBGC and I.R.S., who both lack the authority to grant appropriate equitable relief to participants under ERISA Title I. The 1987 Act's requirement that the PBGC collect all benefit liabilities from the employer has not cured the problem, since the collection and commencement of proper payments years after an employer's intentional understatement is a plan termination may not be appropriate equitable relief. The PBGC also needs reining in from its position that the exclusive remedy for a contractual or statutory claim under Title I in the context of a termination is by reference to Title IV.[9] Otherwise, participants will be denied appropriate equitable relief, continue to be abused by employers who wish to repudiate their pension plan promises, and denied ready access to the only forum, the federal courts, where those rights under the Plan and Title I may be secured.

Supervisory direction by the Court would eliminate most errors in ERISA cases, place deference to the PBGC and I.R.S. in proper perspective as intended by Congress

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[9] The PBGC has recently argued in *United Steelworkers v. United Engineering*, 839 F. Supp. 1279 (N.D. Ohio 1993) that a Title I action by participants to recover understated benefits in a termination should be dismissed, because it would interfere with PBGC's regulatory responsibilities to collect all benefits. Voiding the termination, not collection of the intentionally understated benefit, may be the appropriate relief.

and this Court in *Mead*, secure appropriate relief and ready access by participants to the federal courts as Congress intended under Title I, and stop the continuing abuse of participants in plan terminations by employers and federal agencies who have no regard for participants' long years of labor in reliance on the employer's contractual pension plan promises, which Congress believed were unconditionally secured by ERISA Title I. Without such direction, abuse of participants in terminations will become the norm rather than the exception, and ERISA Title I after *Aldridge* will be judicially rendered a nullity.

For the reasons set forth above, Petitioners respectfully request that Petitioners' writ for certiorari be granted.

Respectfully submitted,

David E. Hudson
William F. Hammond
Hull, Towill, Norman & Barrett
P.O. Box 1564
Augusta, GA 30903
(706) 722-4481

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Allan C. ALDRIDGE; Dennis W. Peterson and Henry A. Sieron, Plaintiffs-Appellees,

v.

LILY-TULIP, INC. SALARY RETIREMENT PLAN BENEFITS COMMITTEE and Fort Howard Cup Corporation, Defendants-Appellants.

No. 93-9235.

United States Court of Appeals,
Eleventh Circuit.

Dec. 27, 1994.

Employees brought action against employer alleging violations of Employee Retirement Income Security Act (ERISA). Following remand, 953 F.2d 587, the United States District Court for the Southern District of Georgia, Nos. CV187-84 and CV188-38, Dudley H. Bowen, Jr., J., entered partial summary judgment for employees. Employer appealed. The Court of Appeals held that: (1) law of the case doctrine did not bar District Court's consideration of issues of procedural and notice deficiencies relative to amendment and termination of ERISA plan; (2) employer could terminate ERISA plan by adopting board resolution, and was not required to amend plan to cease benefit accruals prior to terminating plan; and (3) failure to provide amendment procedures in plan did not invalidate plan amendment since employees could not show detrimental reliance.

Reversed and remanded.

Clark E. Walter, New York City, Ted Hamby Clarkson, Knox & Zacks, Jack A. Gordon, Augusta, GA, for appellants.

William F. Hammond, Hull, Towill, Norman & Barrett, David E. Hudson, Augusta, GA, for appellees.

Appeal from the United States District Court for the Southern District of Georgia.

Before COX, Circuit Judge, MORGAN, Senior Circuit Judge, and VOLLMER*, District Judge.

PER CURIAM:

INTRODUCTION

Plaintiffs, individuals and a class composed of employees and former employees ("employees") of Lily-Tulip, Inc., filed this civil action against the Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee and the Fort Howard Cup Corporation, challenging the validity of the amendment and termination of Lily's retirement plan.[1] *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan*

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* Honorable Richard W. Vollmer, Jr., U.S. District Judge for the Southern District of Alabama, sitting by designation.

[1] In June 1986, the Fort Howard Cup Corporation was formed when a wholly owned subsidiary of the Fort Howard Company acquired Lily-Tulip, Inc. The Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee was the plan administrator. Both the Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee and the Fort Howard Cup Corporation are defendants in this action. For the sake of convenience, we refer to both Lily-Tulip, Inc. and the Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee as "Lily."

Benefits Comm., 953 F.2d 587, 588 (11th Cir.1992). The district court granted summary judgment in favor of the employees, finding that the termination of and amendments to Lily's retirement plan were void. The court held that the termination was void because Lily had not adopted a written procedure for amending the plan, in violation of the Employee Retirement Income Security Act ("ERISA") Sec. 402(b), 29 U.S.C. § 1102(b). The court also held that the termination of and amendments to the plan were void because they retroactively reduced the accrued benefits of the employees, in violation of ERISA §§ 204(g), 302(c)(8), 29 U.S.C. §§ 1054(g), 1082(c)(8), and because Lily did not give proper notice to the employees of the termination and amendments, in violation of ERISA Sec. 204(h), 29 U.S.C. § 1054(h). Lily appeals the district court's judgment. We reverse.

I. FACTS

In October 1986 Lily's Board of Directors (the "Board") voted to amend and then terminate the Lily-Tulip, Inc. Salary Retirement Plan (the "Plan"). On October 30, 1986 the Board adopted several resolutions by unanimous written consent. One of these resolutions, Resolution II, stated that the Plan would terminate on December 31, 1986.[2] The employees allege that the Plan

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[2] The resolution reads as follows:

> II. Termination of the Retirement Plan
> WHEREAS, The Corporation deems it desirable to terminate the Retirement Plan after the above amendment;

termination eliminated the employees' contingent subsidized early retirement benefits. At the time Lily undertook to terminate the Plan, the Plan was underfunded.

On the same date that the Board adopted the resolution to terminate the Plan, the Board also adopted a resolution calling for the amendment of the Plan. The amendment, Amendment No. 2, effectively reduced accrued benefits.[3] For Plan participants under age 55, benefits were reduced by changing the calculation of the social security offset in the Plan's benefit formula for active employees.[4] The employees also contend that the amendment reduced optional lump-sum benefits by changing the actuarial interest rate and mortality assumptions used in calculating benefits.[5]

> NOW THEREFORE BE IT RESOLVED, That the Retirement Plan be and hereby is terminated effective December 31, 1986, subject to the issuance of a determination from the IRS that the Retirement Plan remains a qualified plan under Section 401 of the Internal Revenue Code upon its amendment and termination.

(R. 11-92, Ex. B.)

[3] On December 23, 1986, Lily revised Amendment No. 2 to clarify its wording. The clarification did not substantively change the effect of the amendment.

[4] Benefits were reduced by effectively changing the Plan section under which these participants' Primary Social Security Benefit (PSSB) was calculated. Specifically, the amendment caused these participants' PSSB to be calculated under Plan section 1.33(c) instead of 1.33(b). This change from 1.33(b) to 1.33(c) had the effect of increasing the social security offset, thereby reducing the participants' benefits under the Plan.

[5] The employees contend that under the Plan, normal retirement benefits were paid as a life annuity. However, the

Lily notified the employees of the proposed termination on October 24, 1986, more than sixty days before the proposed termination date of December 31, 1986. On October 31, 1986, sixty-one days prior to the proposed termination date, Lily sent the employees another letter to bring the employees up to date on the status of the Plan termination and to provide the employees with additional information about their benefits. In addition, on October 31, 1986, Lily sent the employees a notice detailing the definitions and assumptions that would be used in determining each employee's benefits under the terminated Plan. The notice incorporated the changes mandated by Amendment No. 2, but did not inform the employees that an amendment to the Plan had been either proposed or adopted. Along with the letter and notice, each employee received a benefit election form which described the benefits the employee was to receive and allowed the employee to choose the annuity or lump sum form of payment.

Lily submitted the termination and amendment documents to the Pension Benefit Guaranty Corporation ("PBGC") for review pursuant to 29 U.S.C. § 1341. Lily also submitted the documents to the Internal Revenue Service ("IRS"), requesting a determination from the IRS that the Plan would continue to retain its tax-qualified

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Plan participant had the option of choosing a lump-sum payment. The lump-sum present value of the retirement annuity was determined by using certain actuarial interest rate and mortality assumptions. Amendment No. 2 changed the mortality tables to be used. By so doing, the participants assumed life expectancy was effectively reduced, thereby decreasing the lump-sum benefit.

status. The PBGC had no problem with the Plan termination and granted Lily an extension for the distribution of Plan assets pending the IRS's issuance of a letter of determination. The IRS expressed several concerns with the termination and amendment of the Plan, including the amendment of the mortality assumptions and the social security offset. On July 28, 1989, in response to IRS concerns, Lily proposed to adopt Amendment No. 3, which would alleviate IRS concerns regarding Amendment No. 2. The IRS issued a favorable determination ruling subject to the adoption of Amendment No. 3. Amendment No. 3 was adopted and made retroactive to December 31, 1986.[6]

II. PROCEDURAL HISTORY

The employees filed this civil action against the Lily-Tulip, Inc. Salary Benefits Retirement Committee, seeking damages under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, seeking relief for the deprivation of accrued vacation benefits in violation of Georgia law, for constructive discharge in employment in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and for the reduction in benefits accompanied by procedural and notice deficiencies in violation of ERISA.

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[6] A more detailed description of the underlying facts appears in the district court's first order, *Aldridge v. Lily-Tulip, Inc.*, 741 F.Supp. 906 (S.D.Ga.1990), and this court's opinion on interlocutory appeal, *Aldridge v. Lily-Tulip, Inc.*, 953 F.2d 587 (11th Cir.1992).

In 1990 Lily moved to dismiss the complaint. The court dismissed some of the ERISA claims entirely, dismissed some in part, and certified two ERISA issues for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 741 F.Supp. 906, 921 (S.D.Ga.1990), *aff'd in part and rev'd in part*, 953 F.2d 587 (11th Cir.1992). However, the court declined to dismiss some ERISA claims.

The district court dismissed the claims regarding the amendment of the actuarial assumptions and the social security offset, holding that these claims were moot because Amendment No. 3, which superseded Amendment No. 2, addressed the problems raised by the employees in these claims. *See Aldridge*, 741 F.Supp. at 917. The court denied the defendants' request to dismiss the employees' claim that Lily failed to give proper notice to the Plan participants upon the amendment and termination of the Plan. *Id.* at 920-21.

Another ERISA claim asserted that, upon termination of the Plan, Lily had failed to pay a contingent early retirement subsidy that the employees contended was an accrued benefit. The employees argued that under ERISA Sec. 204(g), 29 U.S.C. § 1054(g), early retirement benefits were considered accrued, and could not be decreased except under limited circumstances. The district court held that ERISA Sec. 204(g), which treats early retirement subsidies as accrued benefits, only applies to amendments of ongoing plans, not terminations. Because the case involved a plan termination, the district court dismissed the claims seeking to recover early retirement benefits. *Id.* at 918. However, the court noted that the authority on this subject was in conflict and certified for

interlocutory appeal the issue of whether the employees were entitled to early retirement subsidy benefits upon termination of the Plan. *Id.* at 919.

On interlocutory appeal, we held that ERISA Sec. 204(g) applies both to plan amendments and terminations.[7] However, we affirmed the dismissal of this claim because the Plan was underfunded. Under the version of 26 U.S.C. § 401(a) in force prior to October 16, 1987, accrued rights were nonforfeitable only to the extent they were funded. We affirmed the dismissal of the employees' claim because the employees' "right to subsidized early retirement benefits [upon Plan termination] was limited to the extent to which they were funded, and in Lily's case, they were not funded at all." *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 953 F.2d 587, 592 (11th Cir.1992) (footnotes omitted).

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[7] 29 U.S.C. Sec. 1054(g) reads, in relevant part:

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of –

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits.

29 U.S.C. § 1054(g) (1988).

Following this court's prior decision, the district court again addressed some of the ERISA claims. The employees moved for summary judgment, asserting that the Plan was not properly terminated, that it is ongoing, and that Lily has continuing funding obligations to the Plan and its beneficiaries. The court granted the employees' motion for partial summary judgment, holding that the termination and amendment of the Plan were void and that the Plan is ongoing. The court entered a final judgment on these ERISA claims in favor of the employees. (R.10-107 at 37-38.) Lily appeals.

III. ISSUES ON APPEAL

Lily presents three issues on appeal: (1) whether our previous decision on interlocutory appeal, *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 953 F.2d 587 (11th Cir.1992), resolved the question whether the Plan was terminated effective December 31, 1986; (2) whether a plan sponsor must terminate a plan by formal amendment, or whether it is legally sufficient to terminate by board resolution coupled with timely notice to the PBGC and the plan participants; and (3) whether a plan provision that reserves to the employer the right to amend a plan pursuant to applicable law satisfies ERISA's plan amendment provisions.[8]

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[8] Lily raises a fourth issue on appeal – whether it is appropriate for a court to ignore the findings of the administrative agencies charged with overseeing plans. Considering our resolution of the other issues, we need not address this issue.

IV. STANDARD OF REVIEW

We apply plenary review to the district court's grant of summary judgment. *Dyce v. Salaried Employees' Pension Plan of Allied Corp.*, 15 F.3d 163, 164 (11th Cir.1994). In reviewing the case, we take the facts in the light most favorable to Lily, the nonmoving party. *Meyers v. Ramada Hotel Operating Co.*, 833 F.2d 1521, 1523 (11th Cir.1987).

V. DISCUSSION

A. OUR PRIOR DECISION

The first issue presented is whether this court's previous opinion, *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 953 F.2d 587 (11th Cir.1992), held that the Plan terminated on December 31, 1986, thereby precluding the district court from subsequently finding that the Plan had not terminated and was ongoing. Lily contends that our affirmance of the dismissal of one of the ERISA claims implicitly held that the Plan had terminated. Because this court had already resolved the question, Lily argues, the district court did not have authority to revisit the issue. *See Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506, 1515 (11th Cir.1987), *cert. denied*, 484 U.S. 1006, 108 S.Ct. 700, 98 L.Ed.2d 652 (1988). The employees contend that our previous opinion merely addressed the issue that the district court certified for appeal – whether the employees were entitled to early retirement subsidy benefits upon termination of the Plan. In answering the certified question, the employees contend, we assumed that the Plan had been terminated. The employees argue that our prior decision did not preclude

the district court's decision that the Plan had not been effectively terminated.

When a court of appeals has jurisdiction on interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the scope of appellate review is not limited to the precise question certified by the district court because the district court's order, not the certified question, is brought before the court. *United States v. Stanley*, 483 U.S. 669, 676-77, 107 S.Ct. 3054, 3060, 97 L.Ed.2d 550, 562 (1987). Moreover, this court has held that "a decision of the Court of Appeals at an earlier stage of the same case represents the law of the case not only as to matters 'decided explicitly' but also as to those 'decided by necessary implication.' " *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1196 (11th Cir.) (quoting *Terrel v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir.), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974)), *order amended*, 997 F.2d 1340 (11th Cir.), *and cert. denied*, ___ U.S. ___, 114 S.Ct. 604, 126 L.Ed.2d 569 (1993). However, the law of the case doctrine does not extend to issues the appellate court did not address. *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir.1985), *cert. denied*, 476 U.S. 1169, 106 S.Ct. 2889, 90 L.Ed.2d 976 (1986). Although a "trial court, upon receiving the mandate of an appellate court, . . . must enter an order in strict compliance with the mandate[,] . . . the trial court is free to address, as a matter of first impression, those issues not disposed of on appeal." *Id.* at 1119.

In the district court's original order, the court dismissed several ERISA claims, refused to dismiss some

ERISA claims, and certified two ERISA issues for interlocutory appeal pursuant to 29 U.S.C. § 1292(b). Of particular interest in this appeal, the district court had dismissed as moot Counts IV and VI, the ERISA claims regarding the amendment of the actuarial assumptions and the social security offset. *Aldridge*, 741 F.Supp. at 917. However, the district court had declined to dismiss several ERISA claims, including the claim in Count III that the employees did not receive proper notice of the amendment and termination of the Plan. *Id.* at 920-21.

The district court had held that ERISA Sec. 204(g), which prohibits under some circumstances the decrease or elimination of accrued early retirement benefits, only applies to plan amendments and not terminations, and therefore dismissed the employees' ERISA claim seeking to recover early retirement benefits. *Id.* at 918. However, the court noted that the authority on the subject was in conflict, and certified for interlocutory appeal the issue of whether the employees were entitled to early retirement subsidy benefits upon the termination of the Plan. *Id.* at 919.

On interlocutory appeal, this court limited its review of the district court's order to the question certified for appeal. *See Aldridge*, 953 F.2d at 590-92. We affirmed the dismissal of the employees' ERISA claim for subsidized early retirement benefits because, in answering the certified question, we determined that the employees were not entitled to such benefits upon termination of the Plan. We held that the employees were not entitled to those benefits because under the version of 26 U.S.C. § 401(a) in force prior to October 16, 1987, the employees' "right to subsidized early retirement benefits was limited to the

extent to which they were funded, and in Lily's case, they were not funded at all." *Id.* at 592. Thus, we affirmed the district court's dismissal of the ERISA claim for subsidized early retirement benefits. However, we also held that the district court's analysis was flawed because ERISA Sec. 204(g) applies to both plan amendments and terminations. *Id.* at 590-92, 594.

Although 28 U.S.C. § 1292(b) brought the district court's entire order before us on interlocutory appeal, we did not address any other aspect of the district court's order. Specifically, we did not address whether the Plan had actually been terminated; we merely accepted the language of the certified question and assumed the Plan had terminated for the purpose of answering that question. Moreover, we did not address any ERISA claims other than the claim for subsidized early retirement benefits. *See id.* at 590-92. Because the law of the case does not extend to issues we did not address, following our interlocutory decision the district court was free to determine whether the Plan had been effectively terminated and to address any claims that were not the subject of our opinion on interlocutory appeal.

The claims the district court addressed after our affirmance of the dismissal on interlocutory appeal involve procedural and notice deficiencies relative to the amendment and termination of the Plan. On interlocutory appeal, we only affirmed the dismissal of the claim regarding subsidized early retirement benefits. Because we did not address the alleged procedural and notice

deficiencies, we hold that the law of the case doctrine did not bar the district court's consideration of these issues.[9]

B. REQUIREMENTS FOR VALID TERMINATION

Lily contends that the district court erred in holding that Lily could only terminate the Plan through the adoption of a Plan amendment. Lily further contends that it properly terminated the Plan when its board adopted a resolution providing for the termination of the Plan, and Lily gave appropriate notice to the employees and to the PBGC. On the other hand, the employees contend that the termination is void because only a Plan amendment can effect a termination, and Lily had not adopted a written procedure to amend the Plan pursuant to ERISA Sec. 402(b)(3). The employees further contend that the termination is invalid because the termination violated ERISA Sec. 204(g) by reducing or eliminating accrued benefits without providing notice to the Secretary of the Treasury as required by ERISA Sec. 302(c)(8). The employees also argue that the termination is invalid because the "termination amendment" violated ERISA Sec. 204(h) by not providing notice to the employees of a change in the rate of benefit accrual, after the adoption of the amendment, and 15 days before its effective date.

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[9] The claims on which the district court has now granted relief were not included in that part of the complaint addressed in our prior opinion. Count III, for example, includes the claims relative to notice deficiencies. The district court's interlocutory order had declined to dismiss these notice deficiency claims.

To decide whether the Plan termination in this case is valid, we must first determine the procedural requirements for terminating a plan. ERISA Sec. 4041, 29 U.S.C. § 1341, governs how an employer may terminate a defined benefit pension plan. Section 4041 states: "Except in the case of a termination for which proceedings are otherwise instituted by the [PBGC] as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section." 29 U.S.C. § 1341(a)(1) (1988). Under this provision, the plan administrator is required to give the participants at least sixty days' notice of intent to terminate. *Id.* Sec. 1341(a)(2). The administrator must also notify the PBGC as soon as practicable after notifying the participants. *Id.* Sec. 1341(b)(2)(A). The notice to the PBGC must include a certification by the plan's enrolled actuary that, among other things, the plan is projected to be sufficient, as of the proposed termination date, to pay all the benefit commitments when it is time to distribute them. *Id.*

At the same time it notifies the PBGC, the plan administrator must also give notice to participants and beneficiaries. *Id.* Sec. 1341(b)(2)(B). This notice must specify the amount of such person's benefit commitments as well as the data used to determine the benefit, such as length of service, age, wages, assumptions used (including mortality and interest rate assumptions), and any other information required by the PBGC. *Id.* The PBGC reviews the information provided, and if it believes any of the requirements are not met, or the plan is insufficient to handle the benefit commitments, the PBGC issues a

notice of noncompliance. *Id.* Sec. 1341(b)(2)(C). If a notice of noncompliance is not issued, the plan administrator must distribute the "assets pursuant to the standard termination of the plan as soon as practicable . . . . " *Id.* Sec. 1341(b)(2)(D). If the administrator complies with all of these termination requirements, the plan is terminated and its termination date is the prospective date proposed in the notice of intent to terminate. *Id.* Sec. 1348(a)(1).

After reviewing the record on appeal, we find that Lily complied with all of the requirements for a standard termination under ERISA Sec. 4041. Lily notified the employees on October 24, 1986 of its intent to terminate the Plan on December 31, 1986. This is more than the sixty days notice required by ERISA. Soon thereafter, Lily sent each employee a notice specifying the employee's benefits and the definitions and assumptions used to compute the benefits. Lily also notified the PBGC of the termination, and the PBGC later approved the termination. Therefore, we find that the record shows that the termination complied with the requirements of ERISA Sec. 4041.[10]

Notwithstanding Lily's compliance with ERISA Sec. 4041, the district court held that Lily's plan could not terminate unless the Plan was amended to cease benefits accruals before the proposed termination date. We disagree. Section 4041, which sets forth the exclusive means for a standard termination of a plan, does not require that the plan be amended to terminate the plan. Moreover, it

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[10] Although the requirement that the Plan assets be distributed has not yet been met, that requirement has not yet been satisfied primarily because of this litigation.

has long been a standard practice, recognized by the courts, to terminate a plan by adopting a board resolution. *See Horn v. Berdon, Inc. Defined Benefit Pension Plan*, 938 F.2d 125, 127 (9th Cir.1991); *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 223-24 (3d Cir.1989); *Smith v. Mirman*, 749 F.2d 181, 184 (4th Cir.1984); *Birmingham v. SoGen-Swiss Int'l Corp. Retirement Plan*, 718 F.2d 515, 520 (2d Cir.1983). Therefore, we hold that an employer may terminate a plan by adopting a board resolution, and is not required to amend the plan to cease benefit accruals prior to terminating the plan.

On October 30, 1986 the Board adopted a number of resolutions, one of which terminated the Plan effective December 31, 1986, subject to the IRS issuing a letter of determination that the Plan remained qualified. Another resolution, adopted at the same time, authorized the amendment of the Plan. The amendment provided that the Plan would terminate on December 31, 1986, and also changed the social security offset and actuarial assumptions used in computing benefits. We hold that the termination of the Plan and the amendment of the Plan were distinct events. The termination of the Plan was not dependent upon the successful amendment of the Plan.

The employees also argue that the Plan termination is void because it violated ERISA Secs. 402(b)(3) and 204(h), which require a written procedure for amending the plan and fifteen days' notice for certain plan amendments. Because we hold that a plan amendment is not required to terminate a plan, these ERISA provisions could only be applicable to the termination in this case if they apply to both plan amendments and terminations. We conclude that the requirements in ERISA Secs. 402(b)(3), and

204(h), although applicable to amendments, are not applicable to plan terminations. *See Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034, 1040-41 (3d Cir.) (indicating that a legitimate plan termination would not be subject to Sec. 402(b)(3)), *cert. granted*, ___ U.S. ___, 115 S.Ct. 42, 129 L.Ed.2d 937 (1994); *Campbell v. Federal Deposit Ins. Corp.*, 1994 WL 475067 at *5 (E.D.Pa. Aug. 29, 1994) (holding that although Sec. 402(b) applies to amendments, it does not apply to terminations); *Berard v. Royal Elec., Inc.*, 795 F.Supp. 519, 525 (D.R.I.1992) (holding that Sec. 204(h) only applies to amendments, not terminations).

Applying Sec. 402 to plan terminations does not further the section's primary purpose. The primary purpose of Sec. 402 is to ensure that the interested parties may determine, at any time, their benefits under the plan. Section 402 accomplishes this by requiring employers to adopt a written plan instrument and establish written amendment procedures. *Schoonejongen*, 18 F.3d at 1038; *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291, 295 (4th Cir.1993). Section 402(b)(3) also serves the purpose of preventing unanticipated amendments from defeating employees' expectations of benefits. *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984, 111 S.Ct. 517, 112 L.Ed.2d 529 (1990). These purposes are not achieved by applying Sec. 402 to plan terminations. The notice and procedural requirements specifically tailored for terminations under Sec. 1341 are sufficient to keep employees apprised of their benefits under the plan and to promote certainty with regard to terminations.

Section 204(h) does not by its terms apply to terminations. Section 204(h) creates a fifteen-day notice requirement for amendments that provide for a significant

reduction in the rate of future benefit accruals, not for terminations that eliminate future benefit accruals.

The remaining issue regarding the validity of the termination is whether the termination complied with ERISA Sec. 204(g). ERISA Sec. 204(g) states that accrued benefits may not be decreased except by an amendment to the plan under 29 U.S.C. §§ 1082(c)(8) or 1441. Section 204(g) considers the following to be accrued benefits: the elimination or reduction of an early retirement benefit or subsidy; and the elimination of an optional form of benefit with respect to benefits attributable to service before the amendment. ERISA Sec. 204(g), 29 U.S.C. § 1054(g) (1988). In this case, the termination of the Plan eliminated such benefits only post-termination. Although the amendments may have reduced accrued benefits with respect to pre-amendment service, the termination of the Plan only eliminated future benefit accrual. The termination, a distinct event in this case, did not violate this section.

We hold that the district court erred in holding that Lily had not successfully terminated the Plan.

C. WRITTEN PROCEDURE REQUIREMENT FOR AMENDING THE PLAN

The third issue on appeal concerns the validity of the amendments to the Plan. The issue is whether a plan provision that reserves to the employer/sponsor the right to amend a plan pursuant to applicable law, but does not set forth a specific procedure for amending the plan in writing, satisfies ERISA's plan amendment provisions.

Lily contends that a defined benefit plan need not articulate the procedure by which it may be amended in order to satisfy ERISA's plan amendment provisions. The employees contend that every plan must provide a procedure for amending the plan, and for identifying the persons who have authority to amend the plan. Until the plan documents articulate such a procedure, they argue, any attempted amendment of the plan is void.

In the Plan documents in question, "[t]he Company [reserved] the right to amend the Plan from time to time." (R. 9-86, Ex. 1, sec. 8.1.) The Plan documents provided no procedures for amending the Plan. The district court held that because the Plan "failed to set forth a procedure for amending its terms in writing," the Plan violated ERISA Sec. 402(b)(3), and "until such a procedure is set forth in [the Plan] and followed, the terms of [the Plan] remain unchanged and benefits continue to accrue." (R. 10-107 at 20.) Because Lily's Plan set forth no such procedure, the district court held that any amendment of the Plan was void. (*See id.* at 20-21.) We disagree.

ERISA Sec. 402(b)(3) provides that "[e]very employee benefit plan shall . . . provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." ERISA Sec. 402(b)(3), 29 U.S.C. § 1102(b)(3) (1988). The Third Circuit has held that "[a] simple reservation of a right to amend is not the same as a 'procedure for amending [the] plan'; nor does it provide a procedure 'identifying the persons who have authority to amend the plan.' " Schoonejongen, 18 F.3d at 1038 (quoting ERISA Sec. 402(b)(3), 29 U.S.C. § 1102(b)(3) (1988)). We agree with the Third Circuit and hold that the language in Lily's Plan, reserving "the right to amend the

Plan from time to time," does not constitute a procedure for amending the Plan, and thus violates ERISA Sec. 402(b)(3).

There is a split of authority among the circuits regarding the appropriate remedy for such a violation. The Third Circuit has held that until an amendment procedure is adopted pursuant to Sec. 402(b)(3), amendments to the plan are invalid.[11] On the other hand, the majority of courts addressing this issue have held that a failure to provide amendment procedures does not invalidate a plan amendment unless the plan participants can show detrimental reliance based on the employer's failure to comply with Sec. 402(b). *E.g., Biggers v. Wittek Indus., Inc.*, 4 F.3d 291, 295-96 (4th Cir.1993); *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984, 111 S.Ct. 517, 112 L.Ed.2d 529 (1990); *Murphy v. Keystone Steele & Wire Co.*, 850 F.Supp. 1367, 1379-82 (C.D.Ill.1994). The Adams court reasoned that Sec. 402(b) "serves the important purpose of insuring 'against the possibility that the employee's expectation of the benefit would be defeated' by an unanticipated amendment of a . . . plan, whose benefits employees may come to take for granted. We do not believe, however, that Congress intended that any plan failing to comply with [Sec. 402(b)] would, for that reason alone, become unamendable." Adams, 905 F.2d at 949 (quoting Massachusetts v. Morash, 490 U.S. 107, 115, 109 S.Ct. 1668, 1673, 104 L.Ed.2d 98, 109 (1989)). Therefore, the court held that a showing of detrimental

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[11] Schoonejongen, 18 F.3d at 1040. The court, however, carved an exception for amendments made to the plan to bring the plan in compliance with Sec. 402(b)(3). *Id.*

reliance by the employees is required for an amendment to be avoided under Sec. 402(b)(3). *Id.*

We find the reasoning of the Sixth Circuit in Adams to be persuasive, and hold that an amendment to a plan is not void solely because the plan failed to set forth amendment procedures pursuant to Sec. 402(b)(3). However, we hold such an amendment to be void if the employees can show detrimental reliance based on the plan's failure to comply with Sec. 402(b)(3). In this case, the employees cannot show detrimental reliance because Lily maintains that it is obligated to provide the employees their original benefits upon termination under Amendment No. 3 to the Plan. Because the employees cannot show detrimental reliance, the amendments to the Plan are not void. Therefore, we hold that the district court erred in concluding that the amendments are void.

CONCLUSION

We hold that our previous opinion on interlocutory appeal, *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 953 F.2d 587 (11th Cir.1992), did not bar the district court from addressing the claims and issues which are the subject of this appeal. However, we REVERSE the judgment of the district court granting the employees' motion for summary judgment because we find that Lily has made a sufficient showing that the Plan was terminated effective December 31, 1986, and because the failure to set forth plan amendment procedures in compliance with ERISA Sec. 402(b)(3) did not void the amendments of the Plan in this case. We REMAND to the

district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names of Parties

June 30, 1995

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 93-9235 Aldridge v. Lily-Tulip, Inc. Salary

DC DKT NO.: 87-00084 CV-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

/s/ Miguel J. Cortez
MIGUEL J. CORTEZ, Clerk

Reply To: Pam Holloway (404) 331-3836

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9235

ALLAN C. ALDRIDGE; DENNIS W PETERSON and HENRY A. SIERON,

Plaintiffs-Appellees,

versus

LILY-TULIP, INC. SALARY RETIREMENT PLAN BENEFITS COMMITTEE and FORT HOWARD CUP CORPORATION,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: COX, Circuit Judge, MORGAN, Senior Circuit Judge, and VOLLMER* District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

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* Honorable Richard W. Vollmer, Jr., U.S. District Judge for the Southern District of Alabama, sitting by designation.

polled on rehearing en banc (Rule 35, Federal Rules of appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Illegible R. Cox
UNITED STATES CIRCUIT JUDGE

Allan C. ALDRIDGE, Dennis W. Peterson and Henry A. Sieron, Plaintiffs-Appellees, Cross-Appellants,

v.

LILY-TULIP, INC. SALARY RETIREMENT PLAN BENEFITS COMMITTEE and Fort Howard Cup Corporation, Defendants-Appellants, Cross-Appellees.

No. 90-8686.

United States Court of Appeals,
Eleventh Circuit

Feb. 12, 1992.

Rehearing and Rehearing En Banc
Denied April 9, 1992.

Employees brought action against employer alleging violations of ERISA and RICO. The United States District Court for the Southern District of Georgia, Nos. CV 187-084 and CV188-038, Dudley H. Bowen, Jr., J., 741 F.Supp. 906, entered judgment in favor of employer on ERISA claims and denied motions to dismiss RICO claim, and appeals were taken. The Court of Appeals, Birch, Circuit Judge, held that: (1) at the time, ERISA did not require employer to maintain funding for participant's contingent, forfeitable rights to subsidized early retirement benefits, and (2) there was no showing of pattern of racketeering with respect to withdrawal of vacation rights.

Affirmed in part and reversed in part.

Ted H. Clarkson, Augusta, Ga., Sanford M. Litvack, Dewey & Ballantine, Jack A. Gordon and Karen A. Estilo, New York City, for defendants-appellants, cross-appellees.

David E. Hudson, Hull, Towill, Norman & Barrett, William F. Hammond, Augusta, Ga., for plaintiffs-appellees, cross-appellants.

Appeals from the United States District Court for the Southern District of Georgia.

Before FAY and BIRCH, Circuit Judges, and HOFFMAN*, Senior District Judge.

BIRCH, Circuit Judge:

This is an interlocutory appeal from the United States District Court for the Southern District of Georgia in which pension plan participants ("participants") and the sponsoring company, Lily-Tulip, Inc. ("Lily"), contest the liability of a pension plan sponsor following termination of a plan. The plaintiff-appellants, a class of employees and former employees of the defendant company Lily, appeal the district court's dismissal of their ERISA claim for contingent, subsidized early retirement benefits which they were not paid upon the termination of the Lily pension plan. *See Aldridge v. Lily-Tulip Inc.*, 741 F.Supp. 906, 920 (S.D.Ga.1990). For the reasons that follow, we find that the district court correctly dismissed the participants' ERISA claim and accordingly AFFIRM.

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* Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

The district court also denied the defendant Lily's motion to dismiss the participants' RICO claim, and Lily cross-appeals. *Id.* at 914. Lily argues that the district court erred in finding that the RICO statute was constitutional as applied in this situation, that the RICO pattern requirement was met, that the RICO claim was not barred by the applicable statute of limitations, and that fraud was pled with sufficient particularity. Finding that the district court erred in concluding that the complaint alleged a pattern of racketeering activity, we REVERSE the trial court's denial of Lily's motion to dismiss the participants' RICO claim.

I. FACTUAL AND PROCEDURAL BACKGROUND

Lily was created in September, 1981 by a group of private investors who acquired it as a cup manufacturing division of Owens-Illinois ("Owens"). On approximately September 17, 1981, Lily distributed a memorandum to the employees of the Lily-Tulip cup division of Owens, assuring the employees that there would be no change in retirement benefits upon Lily's acquisition of the division. Lily adopted a defined benefit plan called the Lily-Tulip, Inc. Salary Retirement Plan ("Plan"), which was identical to the plan that had been sponsored by Owens and gave employees credit under the new plan for their accumulated service with Owens.

A. *Contingent Subsidized Early Retirement Benefits*

The Plan provided for normal retirement benefits in the form of a monthly annuity, commencing at age sixty-

five. Additionally, the Plan provided for subsidized and unsubsidized early retirement benefits. An unsubsidized early retirement would require the participant's monthly benefit to be reduced to its actuarial equivalent of the normal retirement benefits commencing at age sixty-five. The subsidized early retirement benefits provided that an employee could retire before age sixty-five and receive more than the actuarial equivalent of their normal retirement. Employees with thirty years of service and fifty-five years of age or ten years of service and sixty years of age were entitled to fully subsidized early retirement benefits.

In accordance with the plan's provisions, Lily amended the Plan on October 30, 1986 so as to effect its termination, as well as the cessation of future benefit accruals after December 31, 1986. R5-48 (Ex. 8); *see also* R5-48 (Ex. 7 at 74) (setting forth company's right to terminate). At the time of its termination, the Plan was underfunded. Lily distributed the Plan assets in order to satisfy those benefits guaranteed by the Pension Benefit Guaranty Corporation ("PBGC"). *See* ERISA Section 404, 29 U.S.C. § 1104 (1988).

The district court certified a class of Plan participants as plaintiffs in this ERISA dispute. The named plaintiffs were at varying degrees of satisfying the age and service requirements for subsidized early retirement benefits at the time of the Plan termination. Lily filed a motion to dismiss the ERISA claim, asserting that the law did not require it to fund the Plan in order to pay participants who would meet the conditions for early retirement benefits after the Plan terminated, if these benefits were unvested and contingent at the time of Plan termination.

The district court granted Lily's motion and certified its resolution of this issue for immediate appeal to this court.

B. *Vacation Pay*

Lily changed its vacation policy in 1982. In June, Lily reduced by twenty percent the amount of vacation time its employees would earn in the future. In November, Lily drafted a memorandum which stated in pertinent part as follows:

> The new policy incorporates the following major changes:
>
> 1. The former vacation benefit is substantially restored with regard to service in relation to length of vacation entitlement, except that there is no partial vacation earned until the completion of a full year of service.
>
> 2. Vacation is earned during the current year rather than the prior year and must be taken in full within the year earned. There is no provision to carry over vacation periods earned in one year into the following year.
>
> The policy as you will note is implemented January 1, 1983 and will supersede any and all prior policies at that time. Employees who have existing, untaken vacation entitlements under the former policy have until the end of the year to avail themselves of untaken vacation earned under the old policy.

R7-68 (Ex. to McTague Aff.)

This memorandum was not received by Lily employees until December 1982.

Lily's new vacation policy allowed employees to take their vacation only in the year it was earned, essentially wiping off the slate any vacation earned in 1982. For example, an employee who had earned four weeks of vacation in 1980 could take that vacation in 1981. He could then take in 1982 the vacation time he had earned in 1981, while earning four weeks of vacation time in 1982. However, the vacation he took in 1983 could only be charged to that vacation earned in 1983, thus denying the employee the ability to take at any time the vacation earned in 1982.

At the time of the vacation policy change, Lily removed approximately $1.5 million in employees' accrued vacation liability from its record books and financial statements. The employees were not allowed to take their 1982 vacation time in the weeks remaining in the year after they were notified of the restriction. The employees believed that they would be compensated when they terminated employment or retired for the value of their accrued vacation which they had not been able to take. Certain executives at Lily complained to other executives that the memorandum announcing the change in vacation policy was unclear, and that the employees should be informed that Lily's policy of paying terminated employees for accrued vacation had also been changed. R7-68 (Cross and McTague Affs.). The participants claim that they were unaware that they would not get paid for the unused vacation until June 1983 when an employee retired and did not receive payment for his 1982 vacation. R3-22 (Aldridge Aff.).

The district court certified a class of plaintiffs consisting of persons seeking damages under federal RICO and

state law for Lily's alleged improper deprivation of vacation benefits for the year 1982. The participants alleged that Lily's change in vacation policy and the manner in which it was communicated were predicate acts of intentional fraud. Lily moved to dismiss both RICO claims, and the district court denied Lily's motions. Although the district court concluded that the Plaintiffs stated a RICO claim, it certified the immediate appeal to this court of its determination of the pattern requirement and the pleading of fraud with particularity issues.

II. DISCUSSION

A. *ERISA Claim*

The participants claim that the district court erroneously dismissed their ERISA claim. In reviewing the district court's dismissal, we will read the facts alleged in the complaint in the light most favorable to participants. "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984). The participants' complaint asserts that they were improperly denied the right to satisfy conditions after plan termination in order to earn the right to subsidized early retirement benefits which were provided in the Plan.[1]

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[1] The district court held that the participants' rights to subsidized early retirement benefits were not created by section 8.1 of the Lily-Tulip Inc. pension plan, which contained the same language as 29 U.S.C. § 1054(g) (1988), because those provisions treated early retirement benefits as accrued only for the purpose

The Plan was amended and restated effective January 1, 1985 to comply with the Retirement Equity Act of 1984, Pub.L. No. 98-397, 98 Stat. 1426 (1984) ("REA"). The Omnibus Budget Reconciliation Act of 1986, Pub.L. No. 99-509, 100 Stat. 1874 (1986), enacted new ERISA Title IV provisions to govern single-employer plan terminations initiated after January 1, 1986 and before December 17, 1987. These provisions are called the Single-Employer Pension Plan Amendments Act of 1986, Pub.L. No. 99-272, 100 Stat. 237 (1986) ("SEPPAA"), and along with REA are applicable to the December 31, 1986 Plan termination. REA amended 26 U.S.C. § 411(d)(6) of the Internal Revenue Code and its twin ERISA section 204(g), 29 U.S.C. § 1054(g), to provide that subsidized early retirement benefits are protected from elimination by a plan amendment or termination for a participant who satisfies the preamendment conditions for the subsidy either before or after the amendment or termination.[2] The

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of an amendment to a plan as opposed to a termination. We hold that the district court clearly erred in interpreting section 8.1 and 29 U.S.C. § 1054(g) as not applying to plan terminations. The legislative history, Internal Revenue Rulings, and our recent case *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir.1988) (en banc) clearly indicate that this provision applies to plan terminations. *See* PBGC Brief at 7-8. Although we disagree with the district court in as much as we deem these provisions applicable, we affirm the dismissal on the analysis that follows.

[2] ERISA provides that "a plan amendment which has the effect of eliminating . . . a retirement type subsidy . . . shall be treated as reducing accrued benefits." 29 U.S.C. 1054(g). The congressional purpose of protecting unvested, contingent, subsidized early retirement benefits is clearly evinced in the REA legislative history which provides that "a plan is not to be

participants argue that this ERISA provision, along with identical language in Section 8.1 of the Plan, obligates Lily to fund the Plan in order to pay the participants subsidized early retirement benefits upon their post-termination satisfaction of the age and service requirements.

In its amicus curiae brief, the PBGC disagrees with the participants' position that ERISA obligates Lily to provide funding for the Plaintiffs' contingent, subsidized early retirement benefits. As we noted in a recent ERISA decision, "we owe great deference to the interpretations and regulations of the Pension Benefit Guaranty Corporation . . . which [is an] administrative agenc[y] responsible for enforcing and interpreting ERISA." *Blessitt*, 848 F.2d at 1167.

> Furthermore, we only must determine whether the agency's interpretation is reasonable. In making this determination, we "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

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considered to have satisfied all of its liabilities . . . until it has provided for the payment of contingent liabilities with respect to a participant who, after the date of the termination of a plan, meets the requirements for a subsidized benefit." S.Rep. No. 575, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2577.

Id. at 1168 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 11 and 844, 104 S.Ct. 2778, 2782 n. 11 and 2782, 81 L.Ed.2d 694 (1984).

All parties are in agreement that ERISA's Title IV distribution sections do not provide PBGC insurance for the type of contingent benefits which the participants seek in this case. *See* ERISA Section 4044, 29 U.S.C. 1344 (1988). The participants allege that the obligations imposed upon plan sponsors by ERISA Title I (particularly, section 204(g), 29 U.S.C. § 1054(g)) are not undercut by the lesser requirements of the PBGC insurance program incorporated into ERISA Title IV (including section 4044(a), 29 U.S.C. 1344(a)) by SEPPAA. This position is supported by language appearing in a recent Supreme Court opinion: "It is inconceivable that . . . section [4044(a)] was designed to modify the carefully crafted provisions of Title I," pertaining to employees' right to benefits. *Mead Corp. v. Tilley*, 490 U.S. 714, 723, 109 S.Ct. 2156, 2162, 104 L.Ed.2d 796 (1989). However, even if we follow the example of the Fourth Circuit in *Mead*, which on remand held that the plan in that case permitted a reversion of plan funds to the sponsoring company only after the payment of unreduced early retirement benefits, it will not affect our disposition of the present ERISA claim. *See Tilley v. Mead Corp.*, 927 F.2d 756 (4th Cir.1991). In the instant case, the question is not whether and when plan funds may revert to the sponsor, but rather whether ERISA requires the sponsor to *add* funds to the plan upon termination.

According to the PBGC's reasonable interpretation of the ERISA sections applicable to this plan termination,

the participants' ERISA claim fails on the issue of funding. The PBGC asserts that Lily was not required to add additional funds to the Plan upon termination in order to satisfy the participants' contingent, forfeitable rights to subsidized early retirement benefits. SEPPAA and ERISA contain clear instructions on this issue. In a plan terminated under SEPPAA, the contingent early retirement benefits, those which have not vested upon plan termination, fall into category six of ERISA section 4044(a)(6), 29 U.S.C. § 1344(a)(6). As the PBGC stated in its amicus brief, "the benefits included within Category 6 are protected, if at all, by section 411(d)(3) of the Code, 26 U.S.C. § 411(d)(3). As a condition of tax qualification under section 401(a) of the Code, 26 U.S.C. § 401(a), section 411(d)(3) of the Code requires plans to provide that 'the rights of all affected employees to benefits accrued to the date of . . . termination . . . *to the extent funded* . . . are nonforfeitable.' 26 U.S.C. § 411(d)(3) (emphasis added)." PBGC Brief at 13-14. Section 8.2 of the Plan, consistent with section 411(d)(3), provided that the contingent early retirement benefits would be provided "to the extent funded."[3]

Although present law would prevent a plan sponsor from limiting its liability upon its own failure to fund, this restriction was imposed in 1987, and Congress explicitly provided that it would only apply to plan terminations initiated on or after October 16, 1987. Omnibus Budget Reconciliation Act of 1987, Pub.L. No. 100-203,

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[3] Plan section 8.2(d)(8) states that "the Accrued Benefit of each affected Participant, to the extent funded, shall become fully vested as of the date of termination."

101 Stat. 1330 (1987) ("1987 Act"). Therefore, the participants' ERISA claim fails because their right to subsidized early retirement benefits was limited to the extent to which they were funded,[4] and in Lily's case, they were

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[4] Participants cite Treas.Reg. Sec. 1.411(d)-4, Q & A -6 (1988) which became effective January 30, 1986 as support for their proposition that the availability of Sec. 411(d)(6) benefits cannot be conditioned on funding because the level of funding is in the discretion of the employer. This regulation states in relevant part that "the availability of section 411(d)(6) protected benefits in a plan may not be conditioned on a determination with respect to the level of the plan's funded status, because the amount of funding is within the discretion of the employer." *Id.* Despite this language, we are convinced by the legislative history of the Omnibus Budget Reconciliation Act of 1987 that Congress actually modified the law in order to require sponsors to fund contingent early retirement benefits upon plan terminations. If this was the state of the law prior to 1987, the changes effected by the 1987 Act would be superfluous and the mandate that the act not be applied retroactively would be nonsensical.

In explaining its reasons for the 1987 amendments to ERISA, the Senate Finance Committee stated that "[u]nder present law, plan participants may lose their right to pension benefits if a plan is terminated with assets less than termination liability because the employer is not fully liable for unfunded benefits and because the PBGC has no liability for benefits in excess of guaranteed benefits." Staff of Senate Comm. on Finance, 100th Cong., 1st Sess., Explanation of Provisions Approved by the Committee on December 3, 1987 for Inclusion in Leadership Deficit Reduction Amendment 189 (Comm. Print 1987). In passing the 1987 Act, Congress increased an employer's liability to plan participants – without regard to the level of plan assets – from "benefit commitments" to the full amount of "termination liability," i.e., fixed and contingent liabilities. Prior to the 1987 Act, the law allowed that "[a] plan may be terminated . . . only if it has sufficient assets to pay all benefit commitments under the plan," but expressly did not require that a plan have sufficient assets to cover the full termination

not funded at all.[5]

The participants argue that Lily is unjustly enriched if it obtains the service of its employees with an illusory promise of consideration in the form of subsidized early retirement benefits. It seems unfair that Lily can leave a promised benefit unfunded, effectively denying the very benefit which it has promised in return for the participants' service. As Congress did in 1987, we find these policy arguments persuasive. Nevertheless, this court lacks authority to require more of Lily than the governing law demands. Therefore, we find that the district court correctly dismissed the participants' ERISA claim.[6]

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liability (including contingent liabilities). H.R.Conf.Rep. No. 495, 100th Cong., 1st Sess., pt. 1, at 879 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1625.

[5] Hence, the question of whether or not these benefits are characterized as "accrued" is irrelevant to our determination of whether the district court properly granted Lily's motion to dismiss the ERISA claims.

[6] We reject the participants' argument that Lily's failure to provide plan assets for the contingent early retirement benefits was a violation of the exclusive benefit rule of ERISA section 403(c)(1), 29 U.S.C. § 1103(c)(1) (1988). The rule provides in relevant part that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits . . . and defraying reasonable expenses of administering the plan." *Id.* The exclusive benefit rule can only be violated if there has been a removal of plan assets for the benefit of the plan sponsor or anyone other than the plan participants. *See Holliday v. Xerox Corp.*, 732 F.2d 548, 551-52 (6th Cir.), *cert. denied*, 469 U.S. 917, 105 S.Ct. 294, 83 L.Ed.2d 229 (1984). That the participants' benefits were underfunded does not in itself mean that there was a removal of plan assets which inured to the benefit of the employer.

B. *RICO Claim*

The participants allege that Lily committed RICO violations with regard to its change in vacation policy, commencing with the Tucker memo and followed by a five-year period in which Lily used the mails to alter corporate financial records as well as to conceal Lily's fraudulent taking from its employees. Lily challenges the district court's denial of its motion to dismiss the participants' RICO claim on the grounds that the applicable statute of limitations bars the claim, the participants did not adequately allege a pattern of racketeering activity, the participants failed to plead fraud with particularity, and that RICO is unconstitutional as applied in this case. In light of *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), we find that the district court should have dismissed the participants' RICO claim because the participants have failed to allege a pattern of racketeering pursuant to 18 U.S.C. § 1961(5) (1988).[7]

Congress provided that in order to assert a RICO claim a plaintiff must allege a "pattern of racketeering activity" which is defined as "at least two acts of racketeering activity." 18 U.S.C. § 1961(5). In 1985, the Supreme Court suggested that the lower courts focus on the concept of "continuity plus relationship" in developing standards for evaluating the existence of a "pattern of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 3285 n. 14, 87 L.Ed.2d

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[7] Therefore, we find it unnecessary to consider Lily's challenge to the district court's other conclusions upholding the participants' RICO claim.

346 (1985). The Court offered further guidance on the "continuity plus relationship" pattern requirements in *H.J. Inc.*:

> Continuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. It is, in either case, centrally a temporal concept – and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts of offenses, and the *relationship* these predicates must bear to one another, are distinct requirements.

492 U.S. at 241-42, 109 S.Ct. at 2902 (emphasis in original) (citations omitted).

The participants allege that Lily used the mails in June, November and December, 1982 to alter Lily's financial records and to distribute "memoranda to implement the defrauding of the plaintiffs' vacation benefits." *Aldridge*, 741 F.Supp. at 912 (quoting the participants' complaint). The participants further allege in their complaint that Lily "continued to use the mails at least through February, 1987, to misrepresent the status of the vacation benefits" in order to prevent the participants from suing Lily to recover these benefits. *Id.*

We must conclude on this record that Lily's alleged illegal activity was not a pattern of racketeering of the closed-ended type. We find that it was accomplished in too short a period of time, approximately six months, in order to qualify as a pattern of racketeering activity. The Tucker memo, announcing in relatively clear terms Lily's intent to deprive its employees of their 1982 vacation

benefits,[8] along with the removal of $1.5 million in liability from Lily's books, effectuated Lily's purported scheme to deprive the employees of their vacation benefits. As the Court stated in *H.J. Inc.*, "predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy the pattern requirement." 109 S.Ct. at 2901.

Addressing whether Lily's activity threatens repetition in the future, we find that the facts alleged by the participants do not describe a pattern of racketeering under the open-ended concept. Lily's scheme was to deprive its employees of their 1982 vacation benefits and, thereby, to remove from their books $1.5 million in corporate liability. There are no allegations which would allow us to conclude that Lily's act of taking their employees' vacation time and subsequent acts to conceal that wrongdoing was a scheme which "projects into the future with the threat of repetition." *H.J. Inc.*, 492 U.S. at 241, 109 S.Ct. at 2902; *see also Olive Can Co. v. Martin*, 906 F.2d 1147, 1150-51 (7th Cir.1990) (holding that defendants' scheme to set up a sham corporation in order to divert

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[8] The participants argue that they reasonably misunderstood the Tucker memo to mean that they would lose the opportunity to take their 1982 vacation time, but that they would be compensated for the value of that time upon termination or retirement. Even assuming that the participants reasonably misinterpreted the Tucker memo, they were indisputably informed of the scheme at least when the first employee retired in June 1983 and was refused compensation for his accrued vacation benefits. Hence, even accepting the participants' version of the facts, we still find that Lily's illegal activities were accomplished in too brief a period of time in order to qualify as a pattern of racketeering activity.

funds from their original corporation and its creditors to the sham corporation to benefit defendants was close-ended activity over a short period of time, with a natural ending and no threat of ongoing activity which did not satisfy the pattern of racketeering activity requirement under RICO). Lily's acts after the initial taking were allegedly performed in order to conceal their wrongdoing; they did not threaten future harm or a repetition of their illegal acts, nor did they impart any new injury upon the employees. Therefore, we find that the district court erred in its denial of Lily's motion to dismiss the participants' RICO claim.

III. CONCLUSION

For the reasons stated, we hold that the district court's dismissal of the participants' ERISA claim is AFFIRMED, and the district court's denial of Lily's motion to dismiss the participants' RICO claim is REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

ALLAN C. ALDRIDGE, DENNIS W. PETERSON and HENRY A. SIERON,	)	CIVIL ACTION NO. CV 187-084
Plaintiffs	)	
v.	)	ORDER
LILY-TULIP, INC. SALARY RETIREMENT PLAN BENEFITS COMMITTEE and FORT HOWARD CUP CORPORATION,	)	
Defendants.	)	

I.

INTRODUCTION[1]

This case is the product of two class actions that were consolidated by the Court. Current and former employees of Lily-Tulip, Inc. ("Lily") and Fort Howard Cup Corporation ("Fort Howard") seek relief for three general categories of alleged wrongs: (1) a deprivation of

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[1] In this consolidated case counsel for the parties have been invited to submit their separate versions of orders to resolve the issues joined by the motions at bar. The opinion of the Court of Appeals is not a model of clarity. The separate submissions of counsel have been of great assistance to the Court in identifying the issues and in resolving same – much more so than the appellate opinion. Normally disinclined to embrace the entirety of any "proposed order" to resolve issues of such variety and complexity, in this case I am comfortable with the plaintiffs' submission, and I have adopted it with minor modifications.

accrued vacation benefits (the "Vacation Claims") in violation of Georgia law; (2) reduction in benefits, procedural and notice deficiencies in violation of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq. (1985), and (3) constructive discharge in employment in violation of the Age Discrimination Employment Act ("ADEA"), 29 U.S.C. §621 et seq. (1985). The first two categories have occupied the attention of the parties and the courts to this point.

A more detailed description of the underlying facts and procedural history of the case is found in this Court's order of June 12, 1990, *Aldridge v. Lily-Tulip, Inc.*, 741 F. Supp. 906 (S.D. Ga. 1990), and in the opinion of the Eleventh Circuit Court of Appeals, *Aldridge v. Lily-Tulip, Inc.*, 953 F.2d 587 (11th Cir. 1992).

II.

THE PREVIOUS DECISIONS IN THIS CASE

In this Court's order of June 12, 1990, substantive rulings were made in two of the major divisions in this case. In regard to the Vacation Claims, the Court ruled as follows:

(a) Defendants' motion to dismiss the Federal RICO claims as barred by the statute of limitations was DENIED. 741 F. Supp. at 910-11.

(b) Defendants' motion to dismiss the Federal and State RICO claims for failure to adequately plead a pattern of racketeering activity was DENIED. However, the Court certified for immediate appeal whether the

allegations of the complaint satisfied the requirement under RICO for alleging "a pattern of racketeering activity." *Id.* at 913.

(c) Defendants' motion to dismiss the RICO fraud allegations as lacking the particularity required by Rule 9, Fed.R.Civ.P., was DENIED. However, the Court certified this issue for appeal as well. *Id.* at 914-15.

(d) Defendants' motions to dismiss the claims of breach of trust and breach of contract were DENIED. *Id.* at 915-17.

(e) Defendants' motions to dismiss the claims of tortious conversion and fraud were DENIED. However, whether the tortious conversion and fraud claims were, like the RICO claims, time barred was certified for immediate appeal. *Id.* at 915-16.

On the ERISA claims, this Court in the same order made the following rulings:

(a) This Court concluded that ERISA's limitations on an employer's power to amend a plan and reduce benefits did not apply in the context of a plan termination in 1986. *Id.* at 918. Also, the Court concluded that early retirement benefits are not protected benefits in a plan termination and that the claims for those benefits should be dismissed. The Court recognized this as a controlling issue of law and certified it for immediate appeal. *Id.* at 919-20.

(b) The Court GRANTED defendants' motion to dismiss the claims that the plan termination resulted in a violation of ERISA's "anti-inurement" prohibitions, and held

this issue should be certified for immediate appeal. *Id.*

(c) The Court DENIED defendants' motions to dismiss the remaining ERISA claims: conduct to prevent plan participants from pursuing administrative remedies; breach of fiduciary duties in calculating benefits and representing those benefits to plan participants; and the claim that defendants failed to give proper notice in connection with the plan termination. *Id.* at 920.

(d) This Court dismissed as moot the ERISA counts that alleged the defendants had improperly changed social security offsets, mortality tables and interest rates in calculating benefits. This was based on the Court's prior determination that ERISA §204(g) did not apply to a plan termination and on pleadings which established that defendants had agreed in 1989 to make these changes in benefit calculations. *Id.* at 917.

On appeal, the Eleventh Circuit addressed certain of the issues which had been certified for immediate appeal. This Court's understanding of the appellate opinion as it impacts the two major divisions of this case, is as follows.

Vacation Claims: The Eleventh Circuit found that the RICO allegations were insufficient to satisfy the requirement of "continuity plus relationship" that is necessary for the existence of a "pattern of racketeering activity pursuant to 18 U.S.C. §1961(5)." 953 F.2d at 593-94. Accordingly, the District Court's refusal to dismiss the federal RICO allegations was reversed. *Id.* at 594.

ERISA Claims: The Eleventh Circuit affirmed the District Court's dismissal of the ERISA claim for subsidized early retirement benefits in a terminated plan and the anti-inurement claim. *Id.* at 592. But of significant importance to subsequent proceedings in this case, the Eleventh Circuit held that the District Court erred in its determination that ERISA's limitation on eliminating or reducing retirement subsidies, optional and other accrued benefits, ERISA §204(g), 29 U.S.C. 1054(g) (1985 & Supp. 1993), did not apply to plan terminations. *Id.* at 590 n. 1.

III.

ANALYSIS – VACATION CLAIMS

(A) *Contention of Parties.* Plaintiffs have filed a motion to lift the stay on discovery which has been pending on the Vacation Claims. Defendants have moved the Court to dismiss so much of the Vacation Claims as are based on Georgia RICO and tortious conversion under Georgia law. Defendants contend this would leave only breach of constructive trust and contract as pending claims dealing with vacation benefits.

(B) *Georgia RICO claims.* Plaintiffs argue that the Eleventh Circuit opinion addressed only federal RICO claims and did not dispose of the separate count in the complaint alleging a violation of the Georgia version of RICO, which is similar to, but significantly different from, its federal counterpart. *See* O.C.G.A. §16-14-1 *et seq.* (1992). Defendants contend to the contrary.

Examining the Eleventh Circuit opinion, it is apparent that the appellate court addressed only the federal

RICO issues. *Aldrige,* 953 F.2d at 592-94. Especially telling is the following statement: "We find that the district court should have dismissed the participants' RICO claim because the participants have failed to allege a pattern of racketeering *pursuant to 18 U.S.C. §1961(5) (1988).*" *Id.* at 593 (emphasis added). It is obvious from this that the Court made its determination based on the federal statute. In addition, there is no substantive discussion whatsoever of the Georgia RICO statute in the appellate opinion. Also, the opinion is based upon the Court's application of *H.J., Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229 (1989), a decision clarifying the continuity requirement for a pattern of racketeering activity under the federal statute. *Aldrige,* 953 F.2d at 593-94.

It is also important to note exactly what was certified for immediate appeal by the District Court. This Court was not uncertain about the legal import of the number of alleged acts but whether they "amount[ed] to or constitute[d] a threat of continuing racketeering activity." *Aldridge,* 741 F. Supp. at 911. This was analyzed in view of the "continuity" requirement recently imposed by the United States Supreme Court in *H.J. Id.* at 912-913. Accordingly, the issue that was certified for appeal was whether this "continuity" element of the pattern requirement as announced in *H.J.* was met by the allegations in this case. *Id.* at 913. Since continuity is not a requirement of the Georgia RICO statutes, *infra,* only this federal issue was certified for appeal. That being so, it would be unlikely that the Eleventh Circuit would "consider attacks on a non-final order unrelated to the resolution of the specific legal question identified by the district court

in its §1292(b) order." *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 789 n. 9 (11th Cir. 1992).

(C) *Continuity is not a required element under Georgia RICO.*

In *Dover v. State*, 192 Ga. App. 429, 385 S.E.2d 417 (1989), the Georgia Court of Appeals held:

> Because of this difference [requiring similarity in the incidents of racketeering activity], our legislature intended to and did, by virtue of O.C.G.A. §16-14-4(a) and 16-14-3(2), subject to the coverage of our RICO statute to crimes, included in the statute as designated predicate acts, which are a part of the same scheme, *without the added burden of showing that defendant would continue the conduct* or had been guilty of like conduct before the incidents charged as a RICO violation. *Id.* at 432, 385 S.E.2d at 420. (emphasis added).

Accord Larson v. Smith, 194 Ga. App. 698, 391 S.E.2d 686 (1990).

Defendants assert that since these were decisions of the Georgia Court of Appeals and not the Georgia Supreme Court, the federal District Court is free to reexamine the issue in light of federal decisions, which require continuity as well as multiple, related predicate acts. However, this Court is not free to displace an interpretation of Georgia law from its intermediate appellate court with its own elucidation. As Chief Judge Edenfield wrote in *Claussen v. Aetna Casualty & Sur. Co.*, 754 F. Supp. 1576 (S.D. Ga. 1990):

> [A] federal court applying state law is bound to adhere to decisions of the state's intermediate

> appellate courts absent some *persuasive* indication that the state's highest court would decide the issue otherwise. This is true, even if the federal court does not agree with that state court's reasoning or the outcome which the decision dictates.

Id. at 1583. (emphasis original).

While it is true that the Eleventh Circuit held that the alleged wrongdoing in this case did not meet the "continuity plus relationship" standard for federal RICO, it was because the alleged wrongful acts occurred over "too brief a period of time." *Aldridge*, 953 F.2d at 593 n. 8. But as shown by the foregoing authority from the Georgia Court of Appeals, time span is irrelevant in determining whether a Georgia RICO claim has been sufficiently pleaded.

(D) *Mail and wire fraud are predicate acts for Georgia RICO.*

Defendants assert that since O.C.G.A. 16-14-3(9) contains the language that racketeering acts are those "chargeable by indictment under the following laws of this state," the legislature did not mean to include federal mail and wire fraud as predicate acts since they are not crimes under state law.

This issue has been decided adverse to the position of the defendants. I am inclined to adopt the holdings of my colleague Judge Alaimo in *State ex rel. Bowers v. Dairymen, Inc.*, 813 F. Supp. 1580, 1585 (S.D. Ga. 1991) that mail and wire fraud are predicate acts under the Georgia statute.

(E) *The claim for tortious conversion.*

Defendants argue that the allegations of the complaint cannot support the tort of conversion under Georgia law. They argue that the failure to pay vacation benefits is at most a breach of contract. In support, they cite the case of *LaRoche Indus. v. AIG Risk Management, Inc.*, 959 F.2d 189 (11th Cir. 1992).

In *LaRoche,* the court of appeals agreed with the trial court that failure to pay interest on insurance proceeds was a breach of contract only and not a tort. *Id.* at 191. However, the opinion gives an explanation of conduct like that in the present case, which does constitute conversion.

> Georgia law recognizes conversion where the plaintiff's claims are to specific escrow funds and when the plaintiff seeks recovery of specific proceeds collected by the defendant and then misapplied.

Id. at 1920.

In this case, plaintiffs allege that defendants withheld a portion of an employee's current compensation as it was accrued (earned) monthly and recognized a specific liability in such withheld amount to employees on the financial records of the company. Plaintiffs allege the withheld portion of an employee's current compensation had a specific value shown as a separate entry in the financial records of the company and was payable in the following year or upon termination of employment, if not then used. Plaintiffs allege this liability was subsequently eliminated and the value of this reserved fund appropriated to the company and taken from the employees so the

equity of the company could be improved and a default under its leveraged buy-out loan agreements avoided.

On a motion to dismiss, I cannot conclude that plaintiffs will be unable to prove conduct that satisfies the requirements of *LaRoche* and the Georgia cases upon which it relies.[2]

(F) *Sufficient predicate acts to meet the Georgia RICO requirements of a pattern.*

In the case of *Interagency, Inc. v. Danco Financial Corp.*, 203 Ga. App. 418, 417 S.E.2d 46 (1992), the Georgia Court of Appeals discussed the requirement under the Georgia statute for proof of a pattern.

> [A] pattern consist[s] of two or more acts, i.e., predicate acts. By definition, the incident on trial would constitute one of the acts upon which the cause of action is predicated. (cits. omitted). Pattern of racketeering activity means 'engaging in at least two incidents. . . . '

Id. at 424, 417 S.E.2d at 53.

Defendants assert that because mail and wire fraud cannot constitute predicate acts and because tortious conversion cannot be a predicate act, the allegations in the complaint are insufficient to set forth a pattern of predicate acts. As noted above, I have concluded that mail and wire fraud can be predicate acts. At this juncture I am not

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[2] *LaRoche* cites *Atlantic Mechanical Contractors, Inc. v. Hurston*, 185 Ga. App. 511, 364 S.E.2d 638 (1988) where the tort of conversion under Georgia law was held to have occurred when an employer failed to pay employee benefits from funds set aside for that purpose. 959 F.2d at 191-92.

prepared to say that tortious conversion cannot be proved. I adhere to the summary of plaintiffs' allegations found in *Aldridge*, 741 F. Supp. at 912. This is an accurate description of the pleadings. These allegations are sufficient to sustain a Georgia RICO claim against a motion to dismiss. While these allegations of plaintiffs were found by the Eleventh Circuit to be insufficiently "continuous" or "open-ended" for purposes of federal RICO, the allegations do set forth ample predicate acts for purposes of Georgia RICO.

(G) *Conclusion:*

For the reasons stated in the foregoing, defendants' motion to dismiss certain of the Vacation Claims is denied. The November 2, 1988, stay of discovery is hereby lifted. The parties shall have four months within which to complete discovery on the Vacation Claims.

IV.

ANALYSIS – ERISA CLAIMS

The plaintiffs have moved for summary judgment and pray that the Court order that the Plan was not properly terminated, that it is ongoing, and that defendants have continuing funding obligations to the Plan and its beneficiaries. Plaintiffs contend generally that defendants did not timely or properly implement a plan termination in 1986; that if it was timely and properly adopted, it impermissibly reduced benefits; that the 1989 amendments to the termination both may not and do not cure these defects; and that even if the 1989 amendments would have cured the defects, they were invalid because

they were prohibited retroactive amendments, and participants were not given proper notice as required by Title I of ERISA.

Defendants have filed a cross motion for summary judgment on the ERISA claims. Generally they contend that the Eleventh Circuit opinion disposes of all ERISA issues, and to the extent it did not, that plaintiffs contentions regarding the ineffective termination of the plan are unfounded based on the undisputed facts and controlling principles of law.

The remainder of this order will address the issues that have been framed by the parties regarding ERISA Claims.

(A) *The Scope of the Eleventh Circuit Decision:*

When the District Court made its rulings in 1990, it concluded that the anti-cutback limitations in ERISA §204(g) did not apply to plan terminations and Counts Four and Six (social security and actuarial assumption changes) were thus moot because defendants further amended the Plan in Amendment No. 3 to clarify and in part correct the benefit reductions in Amendment No. 2. It also ruled that the employer had no obligation to fund contingent subsidized benefits in a terminated plan, and that defendants had not violated the anti-inurement prohibitions of ERISA (Counts Two and Eight). The District Court refused to dismiss the other ERISA claims (Counts One, Three, Five, Nine and Ten) including that defendants had failed to give proper notice to terminate the Plan.

The ERISA issues that the District Court certified for appeal were whether the "plaintiffs were entitled to early retirement subsidy benefits upon termination of the plan. . . . " *Aldridge*, 741 F. Supp. at 919, and whether the anti-inurement provisions were violated. *Id.* at 919-20. While the goal of this certification of issues was to obtain guidance for the court and parties, the opinion of the Eleventh Circuit has generated conflicting interpretations and uncertainty. For example, the Eleventh Circuit opinion can be read as an affirmance only of the District Court's holdings on the two certified questions: to-wit, there is no obligation to fund contingent subsidized benefits when a plan is terminated, and the anti-inurement provisions were not violated.

Another interpretation, and the one argued by the plaintiffs, is that the Eleventh Circuit opinion requires this Court to determine on remand whether the Plan termination resulted in impermissible benefit reductions. This is based on footnote 1 of the Eleventh Circuit opinion which held that the District Court had been "clearly erroneous" in holding that §204(g) does not apply to plan terminations. A plan termination which violates §204(g) is deemed not to be terminated.

The reading of the Eleventh Circuit opinion urged by the defendants is that the Eleventh Circuit affirmed the District Court's dismissal of alleged §204(g) violations as moot even as it held that the District Court "clearly erred" as to the applicability of §204(g). Defendants make their argument based on the last sentence of footnote 1 where the appellate court stated that although it "disagree[d] with the District Court in as much as we deem these provisions applicable, we affirm the dismissal on

the analysis that follows." 953 F.2d at 590. In other words, defendants argue the following. Even though we may have impermissibly reduced benefits when we attempted to terminate the Plan in 1986, and did not restore them until required to do so in part in 1989 by the IRS, the District Court determined these claims were moot because §204(g) did not apply to a plan termination. And while the Eleventh Circuit found that this was clear error, the District Court is now powerless to revisit these issues because of the affirmance by the Eleventh Circuit of the certified issues.

This Court does not believe that such an illogical result is mandated by the law of the case doctrine or was intended by the Eleventh Circuit. As the Eleventh Circuit recently held in another case, *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186 (11th Cir. 1993), "[A]n appellate court's decision of an issue must be followed in all subsequent trials or intermediate appellate proceedings in the same case 'except where there are 'the most cogent of reasons, such as . . . the need to avoid manifest injustice.' " 990 F.2d at 1196. There are numerous reasons why this Court cannot accept defendants' argument that the Eleventh Circuit decision forgoes further consideration of plaintiffs' contentions that defendants reduced benefits by eliminating retirement subsidies, and by changing the social security offset and actuarial assumptions in violation of §204(g).

(1) The Eleventh Circuit's holding so construed would render the otherwise unconditional protections of subsidized retirement and other accrued and optional

forms of benefits in ERISA Title I §204(g) illusory.

(2) The Eleventh Circuit's holding as construed by defendants would be inconsistent with Congress' intent set forth in both the Retirement Equity Act of 1984 ("REA") and the Single Employer Pension Plan Amendment Act of 1986 ("SEPPAA"). The REA legislative history provides that ERISA §204(g) applies to plan terminations without exception. *See* S. Rep. No. 98-575, 98th Cong., 2d Sess., reprinted in 1984 *U.S. Code Cong. & Admin. News*, 2573, 2577. Also, the SEPPAA legislative history prohibits the PBGC, with regulatory authority over ERISA Title IV and terminated plans, from interfering with a participant's exercise of his right to enforce the provisions of ERISA Title I, even if the relief results in the plan being treated as if no termination had occurred. *See* H.R. Rep. No. 99-241, Part 2, 99th Cong., 2d Sess., reprinted in 1986 *U.S. Code Cong. & Admin. News*, 685, 702-3.

(3) A skewed reading of the Eleventh Circuit's footnote 1, *Aldridge*, 953 F.2d at 590 n.1, would eliminate the right of participants to enforce the provisions of ERISA Title I §204(g) and §302(c)(8) incorporated therein, or the terms of the Plan, such as Plan §8.1(d), in the federal courts as provided in 29 U.S.C. §1132(a)(3)(B)(ii) (1985 & Supp. 1993).

(4) Accepting the reversal of the District Court's holding stated in footnote 1 without providing relief for a §204(g) violation as prescribed by §302(c)(8) would be

> grossly inequitable and would undercut the entire purpose of ERISA, which is to insure the realization of a participant's benefit promises and expectations characterized as accrued benefits by Congress.

For these reasons, I conclude that the §204(g) issues were not resolved by the Eleventh Circuit opinion. Additionally, the Court will now examine the merits of the alleged violations of ERISA §204(g), as well as the alleged violations of ERISA §§402(a) and (b), 302(c)(8), and 204(h), each of which provide separate and independent grounds for the nullification of the purported plan termination.[3] If plaintiffs prevail on any one of these contentions, the Plan did not lawfully terminate and the remedy is that it must be treated as an ongoing plan by the defendants.

(B) *Timeliness of the Purported Plan Termination:*

Initially, the District Court must address the issue of the procedural timeliness of any termination. The plaintiffs contend the benefits in a retirement plan continue to accrue until a plan is amended in writing in accordance with a procedure set forth in the plan as required by ERISA §§402(a) and (b), 29 U.S.C. §§1102(a) and (b) (1985). The plaintiffs argue the Lily-Tulip Plan reserves the right to amend its terms but contains no procedure for such an amendment. The plaintiffs assert that until the Plan is amended to set forth a procedure for its

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[3] The Eleventh Circuit did not consider the alleged violations of ERISA §§402(a) and (b), 302(c)(8) and 204(h) since these issues were not certified for appeal.

amendment, the Plan can not be amended to stop benefit accruals, and the Plan is ongoing to this very day.

The defendants argue that Resolution No. II of the Board of Directors' Minutes, dated October 30, 1986, terminated the Plan. The plaintiffs counter by pointing out that Resolution No. IV of the same Board of Directors' Minutes dated October 30, 1986 provided that to give effect to the prior resolutions, an officer of the defendant was authorized to execute and adopt Amendment No. 2 to the Plan attached as Exhibit "A" to the minutes, subject to its approval by the I.R.S. Resolution No. II provides in part:

> That the Retirement Plan be and hereby is terminated effective December 31, 1986, subject to the issuance of a determination from the I.R.S. that the Retirement Plan remains a qualified plan under Section 401 of the Internal Revenue Code upon its amendment and termination.

Resolution No. IV – Authorizations for Actions Necessary for Implementation of Above Resolutions provides in part:

> FURTHER RESOLVED, That the Chairman of the Board or any officer authorized by the Chairman of the Board be, and hereby is authorized and directed to execute the above amendments set forth in Exhibit A[4] and B upon receipt of a favorable determination letter from the Internal Revenue Service that the amendment

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[4] Amendment No. 2 to the Retirement Plan was not approved by the I.R.S. and would have disqualified (loss of tax-exempt status) the Plan if not further clarified by Amendment No. 3 in 1989.

> and termination of the Plans does not affect the qualified status of the Plans. . . .

The plaintiffs further emphasize that this amendment to implement the termination was not enforceable by a participant as part of the Plan until adopted, and this adoption did not occur until many months after the effective date of the termination.[5] Additional amendments to correct ERISA Title I and Internal Revenue Code §§401(a) (1986) and 411(d) violations in Amendment No. 2 were adopted in Amendment No. 3 in 1989 some three years following the purported termination.

The defendants argue that Amendment Nos. 2 and 3 were only clarifications of the Board of Directors' Resolution No. II terminating benefit accruals on December 31, 1986. The plaintiffs, on the other hand, contend that the Plan could not be terminated until the adoption of an amendment to the Plan, and such purported Amendment Nos. 2 and 3 are void because ERISA §302(c)(8), 29 U.S.C. §1082(3)(8) (1985 & Supp. 1993) as discussed hereinafter, precludes the validity of certain retroactive amendments (amendments effective prior to adoption).

In this case it can not be determined whether benefits ceased to accrue upon adoption of Resolution No. II or adoption of Amendment No. 2 or 3, even if otherwise effective under ERISA, because the Plan failed to set forth a procedure for amending its terms in writing. ERISA

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[5] A letter to the I.R.S. dated March 30, 1987 from the defendants transmitted *proposed* Amendment No. 2 to the I.R.S. This letter and the unexecuted Amendment No. 2 were obtained by plaintiffs pursuant to discovery under 26 U.S.C. §6104 and provided to the Court on January 5, 1993.

§402(b) requires such a procedure and until such a procedure is set forth in a plan and followed, the terms of a plan remain unchanged and benefits continue to accrue. *Albedyll v. Wis. Porcelain Co. Revised Retirement Plan,* 11 E.B.C. 1072, 1989 U.S. Dist. LEXIS 1043 (W.D. Wis. 1989); *Frank v. Colt Indus., Inc.,* 910 F.2d 90, 98 (3d Cir. 1990); *Hozier v. Midwest Fasteners, Inc.,* 908 F.2d 1155, 1163 n. 9 (3d Cir. 1990). The plan in *Albedyll,* unlike this case, contained a procedure and the issue was whether the procedure was followed. The Plan is this case contains no procedure to follow in order to change the terms of the Plan in writing.

Furthermore, the Third Circuit Court of Appeals has held that minutes of a Board of Directors do not constitute a written amendment to an ERISA plan. *Frank, supra,* at 97-8.

> "[Employer's] contention that the meeting minutes are necessarily conclusive . . . also fails. It is true that trust law looks to the settlor's intent, but only the settlor's intent as manifested in the trust instrument is relevant, unless there is an ambiguity in the instrument." *Frank,* supra, at 99.

This is especially applicable to a Board of Directors' resolution that approves a plan amendment and authorizes its adoption *only* if approved by the I.R.S. sometime in the future. During the period from the proposed date of the Plan's termination on December 31, 1986 until the adoption of Amendment No. 3 in 1989, no participant could read the terms of the Plan and determine with certainty his benefit entitlements. Was the plan terminated on December 31, 1986? Maybe, but only if it was

approved by the I.R.S. in the future. Would benefits be calculated in the termination as set forth in participants' benefit election forms pursuant to proposed Amendment No. 2? Maybe, if Amendment No. 2 is approved by the I.R.S. and adopted without change by an officer of the corporation in the future. This is precisely the uncertainty ERISA §402(a) and (b) are intended to avoid. See ERISA Legislative History – Conf. Rep. 93-1280 (1974), 1974-3 C.B. 415, 458 H.R. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 *U.S. Code Cong. & Admin. News* 4639, 5038, 5077-78.

(C) *ERISA §204(g) Violations:* The plaintiffs also assert that besides ERISA §402, requiring an amendment in writing in accordance with a procedure set forth in the plan to change the terms of a plan, each amendment (including a plan termination) must comply with ERISA §204(g) and each ERISA §204(g)[6] violation forms an independent basis for relief. Additionally, even if the defendants were correct that Resolution No. 2 and the unexecuted Amendment No. 2 were effective in 1986, if

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[6] The pertinent language in §204(g) is: "(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in Section 1082(c)(8) of this title. (2) For purposes of paragraph (1), a plan amendment which has the effect of – (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy." 29 U.S.C. §1054(g).

they violated the anti-cutback provisions of ERISA §204(g) they would be invalid. Therefore, it is necessary to review each prohibited change in the terms of the Plan and the relief prescribed for such a violation.

1. *Social Security*: Until it was rejected by the I.R.S., defendants calculated the accrued benefits of all participants in accordance with Amendment No. 2, which was not adopted until some time after March 30, 1987, more than three months after the effective date of the proposed plan termination on December 31, 1986. For participants under age fifty-five, benefits were reduced by changing the calculation of the social security offset (deduction) in the Plan's benefit formula for active employees from Plan §1.33(b) to §1.33(c). This resulted in an active participant's accrued benefit payable monthly for life at age sixty-five being reduced by varying amounts up to $150.00 or more per month. The I.R.S. refused to approve this change because it violated the plain terms of the plan and I.R.C. §411(d). *See* Correspondence – Exhibits 15, 16, 17 to Plaintiffs' Statement of Material and Undisputed Facts. This was a violation of 26 U.S.C. §411(d) and a simultaneous violation of ERISA §204(g)(1).[7]

2. *Actuarial Assumptions*: The plaintiffs contend the Plan provided for the payment of a participant's normal

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[7] An I.R.S. determination ruling is limited to compliance with I.R.C. §401(a), which incorporates §411. An I.R.S. ruling has no effect on other Federal statutes, such as ERISA Title I. *Aldridge*, 741 F. Supp at 917. However, ERISA Title I instructs us to look to the Treasury's interpretative regulations under I.R.C. §411 to determine whether or not a violation of ERISA §204(g) occurred. *See*: Footnote 8.

retirement benefit as a life annuity or in the optional form of a lump sum *of equal value,* based on certain actuarial interest rate and mortality assumptions in Plan §1.2, upon the plan's termination or upon payment of benefits with a present value less than $3,500. The plaintiffs contend this optional lump sum benefit *of equal value* was eliminated and reduced by Amendment No. 2, which changed all of the Plan's fixed and determinable actuarial assumptions in Plan §1.2, as required by I.R.C. §401(a)(25) and incorporated in Treasury Regulations under I.R.C. §411. Each actuarial assumption change resulted in a lump sum value less than the value calculated using the pretermination assumptions and was further understated by the social security understatement of the normal retirement benefit discussed above.

An optional form of benefit provided by a plan is protected from elimination or reduction in value by ERISA §204(g)(2)(B). Treas. Reg. §1.411(d)-3(b)(1977 as amended in 1985) and the Retirement Equity Act of 1984 legislative history referred to above provide that changes in the actuarial factors utilized to determine an optional benefit, such as a lump sum, may indirectly reduce an accrued benefit.[8] The I.R.S. refused to approve the changed actuarial assumptions proposed in Amendment No. 2 to the Plan because such changes reduced an optional form of benefit in violation of I.R.C. §411(d) and

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[8] 29 U.S.C. §1202(c) (1985) specifically states that regulations promulgated by the Secretary of the Treasury under I.R.C. §411 also apply to interpret the mirror image prohibition of accrued benefit reductions in ERISA §204(g), 29 U.S.C. §1054(g). *Id. Bencivenga v. Western Penn. Teamsters and Emolovers Pension Fund,* 763 F.2d 574, 579 (3d Cir. 1985).

regulations thereunder. This violation of I.R.C. §411 is a per se violation of ERISA §204(g)(2)(B).

3. *Subsidized Retirement Benefit*: The plaintiffs further contend the right to a subsidized early retirement benefit is protected as an accrued benefit by ERISA §204(g). Neither the provisions of ERISA Title IV or I.R.C. §411(d)(3) apply except to a terminated plan. Therefore, consideration of this issue in a *pre-termination* context is not contrary to the Eleventh Circuit's holding, which presumed a termination had occurred.

The protection is contingent because a participant may satisfy the age and/or service conditions for such subsidized benefit either before or *after* the amendment. *See* ERISA §204(g) (flush language). The plaintiffs contend this right to such subsidized benefits is guaranteed by both ERISA §204(g)(2)(A) and Plan §8.1(d). There is no dispute that this benefit was eliminated by the Plan's termination. It was a violation of Plan §8.1(d) for any participant who met such age and service conditions *after* the proposed effective date of the termination on December 31, 1986. This is deemed a reduction of an accrued benefit and prohibited by ERISA §204(g). *See Aldridge*, 741 F. Supp. at 918[9].

(D) *The 1989 Clarifying Amendments Did Not Cure The Defects*: The defendants response to these three reductions in benefits is that the adoption of Amendment No. 3 in 1989, after I.R.S. disapproval, retroactively cured them. The plaintiffs, on the other hand, point out that Amendment No. 3, *if timely, would* have cured only the social security miscalculations and understatement of the optional lump sum in part by restoring the plan's original

actuarial assumptions. The amended Plan still would not provide subsidized benefits for participants who meet the age and 1 service conditions for such benefits upon retirement *after* December 31, 1986.

However, nothing purportedly accomplished in the 1989 Amendment No. 3 shelters the §204(g) and §302(c)(8) violations if the 1989 Amendment No. 3 was untimely as a matter of law. The plaintiffs contend that even if Amendment No. 3 had restored all benefits reduced by the proposed plan termination Amendment No. 2, ERISA §302(c)(8)[9], 29 U.S.C. §1082(c)(8) (1985) does not permit retroactive amendments, because §302(c)(8) provides that no amendment that reduces a participant's accrued benefit *on the date of adoption* of the amendment shall take effect. Amendment Nos. 2 (adopted some time after March 30, 1987) and 3 (adopted in 1989) eliminated all benefits accrued between December 31, 1986 and the dates of their adoptions. *Production and Maintenance Workers v. Roadmaster,* 954 F.2d 1397, 1403-4. (7th Cir. 1992).

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[9] ERISA §302(c)(8), 29 U.S.C. §1082(c)(8) (1985) provides in pertinent part – "any amendment applying to a plan year which – (A) is adopted after the close of such plan year but no later than 2½ months after the close of the plan year . . . , (B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and (C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstance, shall, . . . , be deemed to have been made on the first day of such plan year. No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect. . . . "

ERISA §302(c)(8) also provides that no amendment shall take effect for a plan year if it is adopted more than two and a half months after the end of such year. Both amendments were adopted more than two and a half months after the 1986 plan year to which they applied and are thus invalid.

The plaintiffs have also pointed out that there is only one exception to the retroactive amendment prohibition in ERISA §302(c)(8) which is not herein applicable. It is for hardship cases. If the hardship exception is not met by notice to the Secretary, ERISA §302(c)(8) requires vitiation of an amendment which has the prohibited affect. *See Hoover v. Cumberland, Md. Area Teamsters Pension Fund*, 756 F.2d 977, 984 (3d Cir. 1985). The defendants did not attempt to qualify for the hardship exception by giving notice to the Secretary of benefit reductions, but instead, and just like the defendant in *Collins v. Seafarers Pension Trust*, 846 F.2d 936, 939 (4th Cir. 1988), told the Secretary the contrary – that no benefits were reduced or eliminated by the plan termination or any amendment.[10]

(E) *Proper Notice Must Precede a Plan Termination*: Even if the Plan properly provided a means for its amendment, and the amendment did not reduce benefits

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[10] This false representation was made by the defendant in its answer to question 10(g) on the Treasury Form 5310 determination request submitted to the Secretary of the Treasury for a ruling on the Plan document under I.R.C. §401(a), which incorporates therein the mirror image to ERISA §204(g) in I.R.C. §411. Form 5310 may be found in the Plaintiffs' Exhibit 13 to their Material and Undisputed Statement of the Facts filed with their Motion for Partial Summary Judgment.

in violation of §204(g), it still did not terminate in accordance with ERISA if proper notice was not given. ERISA §204(h) requires prior notice to participants of the terms of any amendment that changes the rate a participant accrues benefits in the future. A plan termination obviously changes the rate of benefit accruals because it results in the complete cessation of future benefit accruals. The terms and conditions of benefit cessation in this plan termination as utilized for calculation of benefits in benefit election forms distributed to participants by the defendants were set forth in Amendment No. 2 and adopted by the defendants some time after March 30, 1987. This violated ERISA §204(h) in two ways.

First, no notice may be given as a matter of law for an amendment if it is deemed void and of no effect under ERISA §§204(g) and 302(c)(8) as discussed above. *Production and Maintenance Workers*, 954 F.2d at 1404[10]. Secondly, the notice must be provided after the amendment is *adopted* and more than fifteen days prior to its effective date. Amendment No. 2 and the partial corrections and clarification in Amendment No. 3 were both adopted *after* the date, December 31, 1986, which defendants assert was the effective date.

The defendants contend notice of the intention to terminate the plan was given by mailing benefit election forms to participants more than sixty days before the proposed effective date and after the adoption of the Board of Directors' Resolution No. II, as required by ERISA Title IV. However, ERISA §204(h) requires notice of the *amendment* after its adoption and the Board of Director's Resolution No. II minutes is not a plan amendment adopted in accord with ERISA §§402(a) and (b).

Additionally the benefit election form calculations distributed to participants prior to December 31, 1986 were also based on the unlawful changes in Amendment No. 2, which never took effect as a result of ERISA §§204(g) and 302(c)(8) violations. The attempted retroactive clarification in Amendment No. 3 is void for the same reasons and violates ERISA §204(h) just as the clarification was rendered void in *Production and Maintenance Workers*, 954 F.2d at 1403-4.

The result is that ERISA §204(h) provides in the imperative that no *amendment* shall become effective without compliance with the notice requirement. Notice of Board of Directors' Resolution No. II and the invalid Amendment No. 2 was not notice of an *amendment* to the Plan.

(F) *Relief*: The plaintiffs contend the Court has no alternative but to grant the relief statutorily mandated in the imperative by ERISA §204(g) and (h) and adopted by other courts in ERISA §402(a) and (b) cases. The plaintiffs have consistently pointed out the absence of any symmetry or equality between the benefits protected by ERISA Title I and those lesser benefits insured and guaranteed by the P.B.G.C. for SEPPAA plan terminations in 1986 and required to be funded under ERISA Title IV. Permitting a plan, which was underfunded in 1986, to terminate in violation of ERISA §204(g) would permit an employer to eliminate or reduce promised accrued benefits protected by ERISA Title I and enforceable by participants, and then not fund the benefits because they were not guaranteed under ERISA Title IV. This is exactly why the remedy, treating the plan termination as void, was the only

statutory means of insuring accrued benefits were funded and paid in the context of a 1986 plan termination.

The plaintiffs have also consistently stated that the only way a plan may be terminated is by compliance with (i) the written amendment procedures in the Plan as required by ERISA §§402(a) and (b), (ii) the anti-cutback and retroactive prohibitions of ERISA §§204(g) and 302(c)(8), and (iii) the notice requirements of ERISA §204(h). A plan that fails to comply with any one of these provisions is not terminated, benefits do not cease to accrue and the provisions of ERISA Title IV and I.R.C. §411(d)(3) are not then applicable.

The defendants, therefore, have not as of the date of this order adopted or provided notice of an effective termination amendment in compliance with 29 U.S.C. §§1054(g) and (h), and 1102(a) and (b), and the Plan shall be deemed to be ongoing. Plaintiffs Motion for Partial Summary Judgment on the ERISA issues is GRANTED. Relief is afforded as follows:

> (a) The defendants, consistent with this holding, are hereby ordered to continue the ongoing operation of the Plan as if it had not been terminated, until such time as the sponsor chooses to amend and effect its termination in compliance with ERISA. Amendment Nos. 2 and 3 are void and shall not be considered as parts of the Plan.
>
> (b) The defendants are further ordered to satisfy the minimum funding requirements of 26 U.S.C. §412 applicable to an on-going plan as soon as administratively practicable so that no accumulated funding deficiency exists for unfunded benefits accrued since 1986. Within forty-five days of this order, a report shall be

filed with the Court by defendants of the amount of the accumulated funding deficiency as of the end of each Plan year 1986, 1987, 1988, 1989, 1990, 1991 and 1992 and the date on which contributions were made to eliminate this deficiency, with service on class counsel.

(c) The defendants are further ordered to give each participant, who retired on or after December 31, 1986 and would have been entitled to the immediate commencement of a retirement benefit, notice of his or her accrued benefit as of the date of retirement and the opportunity to elect the form of benefit to which such participant may be entitled under the Plan. These notices shall be given within sixty (60) days of this Order. If the benefit entitlement of any participant was not paid in prior years upon the participant's retirement, or was paid but in an amount less than the participant's entitlement on the date of employment termination, the defendants shall pay interest on any such deficiency from the date the participant could have commenced receipt of said benefit up to a date not more than twenty (20) days prior to payment. Such arrearages or deficiencies with interest shall be paid in lump sums as soon as administratively practicable. The defendants shall use the P.B.G.C. immediate annuity interest rate on the first day of the Plan year in which the participant retired, as published in Appendix B to PBGC Reg. §2619, for all interest calculations for said participant. Interest at the established rate shall be compounded annually. In the event a participant was entitled to a benefit which he or she did not receive and is now deceased or disabled, the participant's spouse, guardian, or beneficiary or his executor or

administrator as the case may be, shall be entitled to make any benefit election or receive such benefit for the participant in his place and stead. The notices required by this paragraph shall be served on class counsel.

(d) The defendants are further ordered to utilize Plan Section 1.33(b) in determining the social security offset amount in the Plan §3.1 accrued benefit formula, if the calculation of a participant's accrued benefit as an active participant upon termination of employment or retirement would be reduced by utilization of Plan §1.33(c).

(e) The defendants are further ordered to provide to plaintiffs' counsel within sixty (60) days of this order such additional information concerning the benefits participants have accrued up to the end of the month immediately preceding the date this order becomes final as is necessary for plaintiffs to determine, or have determined by their own expert or actuary, the net present value of the increase in benefits to each class member resulting from this litigation, compared to the benefits offered by defendant in the attempted termination in 1986. This voluminous information shall be provided by defendants' actuary in magnetic medium to avoid time delays and cost inefficiencies in analyzing said data. This is required due to the previous stay on discovery, which has deprived plaintiffs of this information. The benefit to the class is one of the criteria plaintiffs must demonstrate and the Court must consider in determining the award of attorney fees to ERISA counsel who prevail in such litigation.

(f) The defendants are further ordered to provide to each participant who has not yet terminated or retired and to new salaried participants who have become eligible to participate since December 31, 1986, notice of their accrued benefit calculation under the terms of this ongoing Plan and consistent with this order, so participants will be appropriately apprised of their benefits. This notice shall provide a calculation of a participant's benefit up to a date that is within thirty days of the date of this Order. The defendants shall, consistent with the preceding paragraph of this Order, advise plaintiffs' counsel of the increase in benefits for each new salaried participant who became eligible to participate since December 31, 1986, but who was not a participant and had earned no accrued benefit on December 31, 1986.

(g) The defendants are ordered to operate this ongoing Plan in accordance with this Order and its terms, to the extent not inconsistent with those provisions of ERISA, as amended from time to time and then applicable to Plan years ending December 31, 1986 and thereafter. The Court recognizes that the provisions of the Plan have not been amended to comply with the numerous changes resulting from the Tax Reform Act of 1986, which became applicable to the Plan retroactively, on the date of enactment or on a delayed effective date for Plan years beginning after the date of enactment.

(h) Within one hundred twenty (120) days of the receipt of the information in (e) and (f) above, class counsel shall file their motion for attorney fees and expenses.

V.

RECAP

For the reasons set forth in this Order, plaintiffs' Motion for Partial Summary Judgment filed July 17, 1992, is GRANTED. Plaintiffs' Motion of July 21, 1992, to amend this Court's order of July 15, 1992, is GRANTED. Defendants' Motion for Partial Summary Judgment filed August 14, 1992, is DENIED.

Pursuant to Rule 54(b), Fed.R.Civ.P., I direct the entry of a final judgment on the ERISA issues which are addressed in this order beginning at page 12.[11] I also make the express determination that there is no just reason to delay the entry of a final order on these ERISA issues and I expressly direct that judgment be entered in favor of the plaintiffs on ERISA Counts Three, Four and Six.

Pursuant to Rule 62(h), Fed.R.Civ.P., I order that the provisions of the final judgment on ERISA issues shall be stayed during the time for appeal and thereafter during the pendency of an appeal if one is taken.

ENTERED AT AUGUSTA this 14th of September, 1993.

/s/ Dudley H. Bowen, Jr.
Dudley H. Bowen, Jr.
U.S. District Judge

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[11] This order and the mandate of the Court of Appeals dispose of all ERISA counts of the complaint except for Count Seven which is the individual claim of Peterson. It remains pending for trial along with the Vacation and Age Discrimination claims.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9235

ALLAN C. ALDRIDGE, DENNIS W. PETERSON and HENRY A. SIERON,

Plaintiffs-Appellees,

v.

LILY-TULIP, INC. SALARY RETIREMENT PLAN BENEFITS COMMITTEE and FORT HOWARD CUP CORPORATION,

Defendants-Appellants,

On Appeal from the United States District Court
for the Southern District of Georgia – August Division

BRIEF OF AMICUS CURIAE PENSION BENEFIT GUARANTY CORPORATION

Dated: January 5, 1994

CAROL CONNOR FLOWE
General Counsel
JEFFREY B. COHEN
Deputy General Counsel
JAMES J. ARMBRUSTER
Assistant General Counsel
GENNICE D. BRICKHOUSE
Attorney

PENSION BENEFIT GUARANTY CORPORATION
Office of General Counsel
1200 K Street, N.W.
Washington, D.C. 20005-4026
(202) 326-4029

Attorneys for Amicus Curiae

ALDRIDGE, et al. v. LILY-TULIP, INC. SALARY RETIREMENT PLAN BENEFITS COMM., et al. (93-9235)

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 28-2(b), the Pension Benefit Guaranty Corporation hereby certifies that the following persons, attorneys, parties and companies have an interest in the outcome of this litigation:

Allan C. Aldridge, Dennis W. Peterson, Henry A. Sieron and other class members

Dewey Ballantine

Fort Howard Corporation

Honorable Dudley H. Bowen of the United States District Court for the Southern District of Georgia

Hull, Towill, Norman & Barrett

Knox & Zacks, P.C.

Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee Sweetheart Cup Company, Inc.

Dated: January 5, 1994

/s/ Gennice Brickhouse
CAROL CONNOR FLOWE
General Counsel
JEFFREY B. COHEN
Deputy General Counsel
JAMES J. ARMBRUSTER
Assistant General Counsel
GENNICE D. BRICKHOUSE
Attorney

PENSION BENEFIT GUARANTY CORPORATION
Office of General Counsel
1200 K Street, N.W.
Washington, D.C. 20005-4026
(202) 326-4029

Attorneys for Amicus Curiae

STATEMENT REGARDING ORAL ARGUMENT

If the Court schedules oral argument in this appeal, PBGC respectfully requests that it be permitted to participate.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9235

ALLEN C. ALDRIDGE, DENNIS W. PETERSON and HENRY A. SIERON,

Plaintiffs-Appellees,

v.

LILY-TULIP, INC. SALARY RETIREMENT PLAN BENEFITS COMMITTEE and FORT HOWARD CUP CORPORATION,

Defendants-Appellants.

On Appeal From The United States District Court For The Southern District of Georgia – Augusta Division

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BRIEF OF AMICUS CURIAE PENSION BENEFIT GUARANTY CORPORATION

STATEMENT OF INTEREST

The Pension Benefit Guaranty Corporation ("PBGC") is the federal agency charged with administering the pension insurance program established under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") PBGC guarantees certain pension benefits, within limits set by statute, upon termination of a defined

benefit pension plan. PBGC's views on questions of statutory interpretation of Title IV are entitled to "great deference." *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 953 F.2d 587, 591 (11th Cir. 1992); *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1167 (11th Cir. 1988) (en banc).

The facts of this case are somewhat complex, and the district court's opinion covers a number of issues that do not involve interpretation of Title IV of ERISA. However, two aspects of the district court's opinion are important to the Title IV scheme; on both of them, the district court erred. PBGC therefore offers its views on these issues only.

STATEMENT OF JURISDICTION

For its statement of jurisdiction, the PBGC relies on the statement of the Appellants.

STATEMENT OF ISSUES

The PBGC's participation in this case is limited to the following issues:

1. Whether a pension plan must be amended to cease benefit accruals before it may be terminated under Title IV of ERISA.

2. Whether, in addition to the notice to participants required by Title IV, Lily Tulip was also required to provide a separate notice of a cessation of benefit accruals under section 204(h) of ERISA.

STATEMENT OF THE CASE

PBGC relies principally on the Appellants' statement of the case. Set forth below is a brief synopsis to provide context and to highlight certain facts relevant to the issues PBGC addresses.

This case arose as a result of an attempt by Lily-Tulip, Inc. ("Lily") to terminate the Lily-Tulip, Inc. Salary Retirement Plan ("Plan"). The Plan is a defined benefit pension plan covered under Title IV of ERISA.

Lily's Board of Directors adopted a resolution on October 30, 1986, stating an intent to terminate the Plan effective December 31, 1986. The next day, October 31, 1986, the Pension Plan Benefits Committee, the Plan's administrator, formally initiated a "standard termination" of the Plan in accordance with section 4041(b) of ERISA, 29 U.S.C. § 1341(b).[1] As that section requires, Lily provided participants a "60-day advance notice of intent to terminate," which informed participants that the Plan would be terminated as of December 31, 1986. Lily also provided PBGC with a required notice that included information about the assets and liabilities of the Plan,

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[1] Title IV of ERISA was amended by Title XI of the Consolidated Omnibus Budget Reconciliation Act of 1986, known as the Single-Employer Pension Plan Amendments Act of 1986 ("SEPPAA"), Pub. L. No. 99-272, 100 Stat. 237 (1986), and by Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, known as the Pension Protection Act of 1987 ("PPA"), Pub. L. No. 100-203, 101 Stat. 1330 (1987). The SEPPAA amendments apply to this case. ERISA as amended by SEPPAA is codified in 29 U.S.C. § 1001 *et seq.* (Supp. IV 1986). Citations in this brief to Title 29 of the United States Code are therefore to that edition, unless otherwise noted.

and provided participants with notices informing them of the amount of their "benefit commitments," including the underlying data used in computing the benefits. *See id.* § 1341(b)(2)(A), (B).[2]

A standard termination can only be completed if all benefit commitments (determined as of the termination date) are provided. If they are not, the plan must continue. 29 U.S.C. § 1341(b)(1)(D). PBGC is required to issue a "notice of noncompliance" within 60 days if it determines that a plan administrator has not complied with the statutory requirements or if it has "reason to believe that the plan is not sufficient for benefit commitments."*Id.* § 1341(b)(2)(C). PBGC did not issue a notice of noncompliance in this case.

At the end of the 60-day period, if a notice of noncompliance has not been issued, the plan administrator is required to commence distribution of assets to participants as soon as practicable. *Id.* § 1341(b)(2)(D). However, before distribution was made in this case, a class of participants (the "Aldridge Participants") filed suit against Lily and the Plan administrator. This appeal is part of that continuing litigation.

Among other things, the Aldridge Participants argued that Lily had unlawfully reduced their accrued benefits in violation of section 204(g) of ERISA, 29 U.S.C. § 1054(g), by attempting to terminate the Plan. Specifically, they asserted entitlement to subsidized early

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[2] "Benefit commitments" is defined in 29 U.S.C. § 1301(a)(16). See also this Court's prior opinion, *Aldridge*, 953 F.2d at 592 n.4.

retirement benefits even though, as of the termination date, they had not satisfied all the eligibility requirements under the Plan.

The district court rejected that claim, primarily on the ground that section 204(g) of Title I of ERISA, 29 U.S.C. § 1054(g), applied only to plan amendments, not plan terminations. *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 741 F. Supp. 906, 918 (S.D. Ga. 1990). On appeal, PBGC filed an *amicus curiae* brief urging affirmance of the district court's dismissal of the Aldridge Participants' claim for subsidized early retirement benefits. However, the PBGC disagreed that section 204(g) applied only to plan amendments. Rather, PBGC, agreeing with Lily, argued that in the circumstances of the case, these early retirement subsidies did not have to be provided upon termination of the Plan. This Court agreed with PBGC's analysis on both points. *Aldridge*, 953 F.2d at 590-92.

On remand, the district court held that the Plan was not terminated but rather was ongoing. The court ruled that a plan cannot terminate unless it is amended to cease benefit accruals prior to the proposed termination and that the Plan here was never properly amended. *Aldridge et al. v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, No. CV 187-084, slip op. at 18-22, (S.D. Ga. Sept. 15, 1993). The district court also held that, even though the Plan administrator had complied with the notice provisions of Title IV of ERISA, the attempted termination failed because a separate notice of cessation of benefit accruals was not provided under section 204(h) of Title I, 29 U.S.C. § 1054(h). Slip op. at 28-30. This appeal followed.

SUMMARY OF ARGUMENT

A plan administrator is not required to amend a plan to cease benefit accruals before terminating it under Title IV of ERISA. In addition, Lily was not required to give a separate notice of a cessation of benefit accruals in addition to the 60-day notice it gave the Aldridge Participants in connection with its termination of the Plan.

Title IV sets forth the exclusive means of terminating a defined benefit pension plan. Title IV, as supplemented by PBGC regulations, sets out detailed procedures for terminating a plan, including the requirement that participants be given 60 days' advance notice in writing. If those procedures are properly followed, the plan is terminated.

The provision of Title I of ERISA that the district court principally relied on requires that if a plan is amended to provide a "significant reduction in the rate of future benefit accrual," participants must be given 15 days' advance notice. This requirement makes sense; it is only fair to participants that they be told if, while continuing to work for the same employer, they will no longer be earning as much in retirement benefits.

But that purpose is served where an employer that is terminating its plan complies with Title IV's already required 60-day notice of the termination. The statute does not require that the plan also be amended to cease benefit accruals since termination by definition will halt such accruals. In this case, it is also unnecessary to require the employer to give participants 15 days' notice of a cessation of accruals in addition to a proper 60 days' notice of the termination. No court has previously held

that such a duplicative procedure is necessary to terminate a plan, and the ruling below is contrary to the common understanding under which thousands of defined benefit pension plans have terminated. This Court should reverse the decision below on these issues.

ARGUMENT

I. A PENSION PLAN DOES NOT HAVE TO BE AMENDED TO CEASE BENEFIT ACCRUALS BEFORE IT MAY TERMINATE.

Section 4041 of Title IV of ERISA governs how a defined benefit pension plan may be terminated by an employer. The heading of subsection (a)(1) of section 4041, "Exclusive means of plan termination," is followed by this unambiguous statement: "Except in the case of a termination for which proceedings are otherwise instituted by the [PBGC] as provided in section 4042, a single-employer plan may be terminated *only* in a standard termination under subsection (b) or a distress termination under subsection (c)." 29 U.S.C. § 1341(a)(1) (emphasis added). Were there any doubt, the SEPPAA legislative history confirms that these provisions set forth the "sole and exclusive means under which a qualified pension plan may be terminated." H.R. Rep. No. 300, 99th Cong., 2d Sess. 289, reprinted in 1986 U.S. Code Cong. & Admin. News 756, 940; *see also PBGC v. Mize CO., Inc.*, 987 F.2d 1059, 1063 (4th Cir. 1993); *Phillips v. Bebber*, 914 F.2d 31, 34 (4th Cir. 1990).

Section 4041 prescribes in considerable detail how such terminations are to be accomplished. Subsection (a)(2) requires the plan administrator to give participants

at least 60 days' advance "notice of intent to terminate." 29 U.S.C. § 1341(a)(2), (b)(1)(A). The notice must state that "such termination is intended and the proposed termination date" as well as any related additional information required by PBGC regulations. *Id.*[3] The plan administrator is also required to give PBGC notice "as soon as practicable" after the notice of intent to terminate is provided. *Id.* § 1341(b)(2)(A). The notice to PBGC must include a certification by the plan's enrolled actuary that, among other things, "the plan is projected to be sufficient (as of such proposed date of final distribution) for such benefit commitments" – in other words, that the plan will have enough money to pay all the benefit commitments when it comes time to distribute them. *Id.*

At the same time that notice is given to PBGC, the plan administrator must also give notice to participants and beneficiaries. *Id.* § 1341(b)(2)(B). This notice must specify "the amount of such person's benefit commitments" as well as the data used to determine the benefit, such as length of service, age, wages, assumptions used (including interest rate), and any other information required by PBGC. *Id.* Moreover, the notice must be "written in such a manner as is likely to be understood by the participant or beneficiary." *Id.*

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[3] PBGC's regulations now require that the notice of intent to terminate explicitly inform participants that after the termination they will no longer accrue any benefits under the plan. Distress Terminations of Single.Employer Plans; Standard Terminations of Single-Employer Plans, 57 Fed. Reg. 59,205, 59,230 (1992) (to be codified at 29 C.F.R. Parts 2616 and 2617).

PBGC has 60 days to review the information provided. *Id.* § 1341(b)(2)(C). During that time, PBGC must issue a "notice of noncompliance" if it has reason to believe that the requirements discussed above have not been met or that the plan "is not sufficient for benefit commitments." *Id.* If no such notice is issued, "the plan administrator shall commence the final distribution of assets pursuant to the standard termination of the plan as soon as practicable." 29 U.S.C. § 1341(b)(2)(D). The plan administrator must then distribute the assets in accordance with section 4044 of ERISA, 29 U.S.C. § 1344. *Id.*

Finally, if the plan administrator complies with all these termination requirements, the plan is terminated and its termination date is the prospective date proposed in the notice of intent to terminate. ERISA § 4048(a)(1), 29 U.S.C. § 1348(a)(1).[4]

Nowhere amongst these detailed requirements is there even a suggestion that a plan must be amended in order to accomplish termination. Neither the district court nor the Aldridge Participants have identified any purpose that would be served in requiring a "termination

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[4] In addition to the mandatory filing with PBGC, the employer may, as it did here, also seek a determination from the Internal Revenue Service ("IRS") that as of the proposed termination date the Plan continues to be tax-qualified. Given the importance to employers and participants of the tax treatment of pensions, such a procedure is often followed. Although prudent, obtaining an IRS determination is not mandatory to properly terminate a plan; compliance with Title IV procedures is mandatory. *PBGC v. Mize Co.*, 987 F.2d at 1063; *Phillips v. Bebber*, 914 F.2d at 34.

amendment."[5] Nevertheless, the district court assumed, without careful analysis, that such an amendment was necessary and proceeded to consider at length whether Lily properly amended its plan.

However, the court's assumption that an amendment is required is unfounded. The opinion below addresses the issue cursorily, stating only the court's apparent agreement with the Aldridge Participants' assertion that "the benefits in a retirement plan continue to accrue until a plan is amended in writing in accordance with a procedure set forth in the plan as required by ERISA §§ 402(a) and (b), 29 U.S.C. §§ 1102(a) and (b) (1985)." Slip op. at 18. This assertion, in turn, appears to be based on section 204(h) of ERISA, 29 U.S.C. § 1054(h), which requires that participants and beneficiaries of an ongoing plan be given 15 days' advance notice of any amendment that will "provide for a significant reduction in the rate of future benefit accrual."

Plan termination has major consequences: it ends the plan sponsor's obligation to make minimum funding contributions, fixes the employer's liability to PBGC for any

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[5] "Termination amendment," the phrase employed by the Aldridge Participants, is not a defined term in ERISA. In practice, plan administrators frequently amend plans to cut off benefit accrual at or near the time of termination. The practice is designed to ensure that, if for some reason the termination is not carried out, the plan will at least be "frozen" – *i.e.*, ongoing but without further benefits accruing. *See* Edward Thomas Veal and Edward R. Mackiewicz, *Pension Plan Terminations* § 5.3, at 75 (1989). However, it is a practice designed to protect the employer, not participants, and there is no reason in law or policy to require it.

underfunding, and establishes the date of cessation of benefit accruals. As the Third Circuit has observed, the termination date "fix[es] the date beyond which, whether or not [employees] continue to work, they no longer accrue additional vested pension rights." *PBGC v. Heppenstall*, 633 F.2d 293, 301 (3rd Cir. 1980); *accord In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 649 (2d Cir. 1983) ("Termination marks the date on which the benefits of plan participants cease to accrue"); *see Blessitt*, 848 F.2d at 1172; *In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d 199, 203 (3d Cir. 1983).

Because of the significance of the effects of plan termination on participants and beneficiaries, Title IV imposes notice requirements that are far more detailed than those applicable if a plan is only being amended to reduce benefit accruals. The district court itself acknowledged that termination of a plan "results in the complete cessation of future benefit accruals." Slip op. at 28. However, the court drew the wrong conclusion from this axiomatic result; rather than recognize that it obviates the need to amend a plan to cease accruals, the court believed it *requires* amendment and notice thereof under section 204(h) because termination "obviously changes the rate of benefit accruals." Slip op. at 28. This conclusion is contrary to the statutory language and the understanding of other courts and pension practitioners. Moreover, no purpose not already served by compliance with the Title IV procedures would be served.

II. THE LILY-PLAN ADMINISTRATOR WAS NOT REQUIRED TO PROVIDE A SEPARATE NOTICE OF CESSATION OF BENEFIT ACCRUALS UNDER SECTION 204(h) OF ERISA IN ORDER TO TERMINATE THE PLAN.

The preceding discussion is virtually dispositive of the second issue as well – whether a separate section 204(h) notice was required where, as here, the plan administrator gave 60 days' advance written notice of intent to terminate the Plan and complied with the Title IV procedures. The Aldridge Participants do not dispute that they actually received this 60-day notice. Plaintiffs' Statement of Material Undisputed Facts, paras. 2-4. Yet they insist, and the district court agreed, that they also should have received a separate 15-day notice that benefit accruals were to be reduced as a result of the termination.

There is no reason to impose such a redundant requirement. Moreover, neither the district court nor the Aldridge Participants have articulated how two notices would benefit participants. Even assuming that section 204(h) is applicable to a plan termination,[6] the purposes of the 204(h) notice were served in this case by Lily's giving the 60-day notice required by section 4041, followed by compliance with the other Title IV procedures.

Much of the confusion in this case stems from the fact that Lily sought to amend the Plan – for other reasons – at

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[6] The Court need not address the issue of whether section 204(h) is applicable to a termination and PBGC expresses no view on this issue, which is within the purview of the IRS. *See* 29 U.S.C. § 1202(c); Reorg. Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (1978).

the same time that it sought to terminate it. Because oversight of ERISA's requirements for plan amendments is committed to the IRS, PBGC makes only the following observation. As we understand the facts, Lily originally sought to amend the Plan to modify social security offsets and certain actuarial assumptions relating to the calculation of lump sum benefits. *See* slip op. at 23-25. And, as we understand it, the 1989 amendments reversed these attempted changes. *See id.* at 26. Thus, if the termination is allowed to proceed, benefits will be provided based on calculations not disputed by the Aldridge Participants (except for the issue of entitlement to subsidized early retirement benefits, which was already resolved in Lily's favor by this Court's earlier ruling).[7]

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[7] One final observation seems in order. The district court stated that "the SEPPAA legislative history prohibits the PBGC, with regulatory authority over ERISA Title IV and terminated plans, from interfering with a participant's exercise of his right to enforce the provisions of ERISA Title I, even if the relief results in the plan being treated as if no termination had occurred." Slip op. at 16-17 (citing H.R. Rep. No. 99-241, Part 2, 99th Cong., 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 702-03). The portion of the report cited was discussing a provision, ultimately enacted in different form, relating to terminations that allegedly would violate a collective bargaining agreement. *See* ERISA § 4041(a) (3), 29 U.S.C. § 1341(a) (3). That provision is not applicable here. In any event, PBGC is in no way attempting to interfere with the exercise of participants' rights under Title I. PBGC is simply concerned that an incorrect interpretation of the provisions discussed in the text could lead to confusion and possibly cast doubt on the validity of thousands of terminations that did not follow the procedure imposed by the district Court in this case.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

Dated: January 5, 1994

/s/ James J. Armbruster
CAROL CONNOR FLOWE
General Counsel
JEFFREY B. COHEN
Deputy General Counsel
JAMES J. ARMBRUSTER
Assistant General Counsel
GENNICE D. BRICKHOUSE
Attorney

PENSION BENEFIT GUARANTY CORPORATION
Office of the General Counsel
1200 K Street, N.W.
Washington, D.C. 20005-4026
(202) 326-4029

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curiae Pension Benefit Guaranty Corporation was sent via Federal Express this 5th day of January 1994, to each of the following counsel of record:

Willian [sic] F. Hammond, Esq.
David E. Hudson, Esq.
Hull, Towill, Norman & Barrett
Seventh Floor
Trust Company Bank Building
Augusta, Georgia 30913

Ted H. Clarkson, Esq.
Knox & Zacks, P.C.
1400 First Union Bank Building
Augusta, Georgia 30903

Clark E. Walter, Esq.
Jack A. Gordon, Esq.
Dewey Ballantine
1301 Avenue of the Americas
New York, New York 10019-6092

/s/ Gennice D. Brickhouse
GENNICE D. BRICKHOUSE
Attorney

PENSION BENEFIT GUARANTY CORPORATION
Office of the General Counsel
1200 K Street, N.W.
Washington, D.C. 20005-4026
(202) 326-4029

Allan C. ALDRIDGE, Dennis W. Peterson and Henry A. Sieron, Plaintiffs,

v.

LILY-TULIP, INC. SALARY RETIREMENT PLAN BENEFITS COMMITTEE and Fort Howard Cup Corporation, Defendants.

Civ. A. No. CV187-084.

United States District Court,
S.D. Georgia,
Augusta Division.

June 12, 1990.

Employees and former employees sued employer under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), various provisions of Georgia law, and the Age Discrimination in Employment Act. Plaintiffs also sued officers of employer. Defendants moved to dismiss. The District Court, Bowen, J., held that: (1) the RICO claim was timely filed; (2) plaintiffs sufficiently alleged a pattern of racketeering activity; and (3) early retirement benefits are not accrued benefits under ERISA.

Granted in part and denied in part, and issues certified for interlocutory appeal.

David E. Hudson, William F. Hammond, Augusta, Ga., for plaintiffs.

Ted H. Clarkson, Augusta, Ga., Sanford M. Litvack, Jack A. Gordon, Valerie A. Cohen, New York City, for defendants.

ORDER

BOWEN, District Judge.

The captioned case is a multiple-count class action brought by current and former employees of defendants Lily-Tulip, Inc. ("Lily") and Fort Howard Cup Corporation ("Fort Howard").[1] The plaintiffs seek damages pursuant to the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* (1984); various provisions of Georgia law; and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (1985). Plaintiffs also seek injunctive relief pursuant to the provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* (1985).

On January 10, 1990, three classes of plaintiffs were certified. The first class consists of persons seeking damages under federal RICO and state law for Lily's alleged improper deprivation of vacation benefits for the year 1982. The second class consists of persons seeking relief pursuant to ERISA, and the third class consists of persons asserting claims under the ADEA. Prior to my certifying the aforementioned classes, the defendants filed a motion to dismiss. A hearing on defendants' motion was conducted May 1, 1990. The motion to dismiss is now before

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[1] As will be more amply explained later, this suit involves a series of successor corporations. However, for purposes of ruling on the defendants' motion, it may be assumed that there is no question of whether the defendants are properly named.

the Court, and I will rule on the issues presented in the order they appear in the motion.[2]

FACTUAL BACKGROUND

In September, 1981, Lily was formed pursuant to the sale by Owens-Illinois Corp. of its paper cup division. Many Owens-Illinois employees transferred to the newly-formed Lily-Tulip corporation as a result of the sale. Around the time of the sale Lily distributed a memo to the transferred employees which informed them that Lily would continue to provide benefits as previously provided by Owens-Illinois. The vacation policy which the September, 1981, memo allegedly pledged to continue provided that salaried employees would accrue vacation time in one calendar year, then take the accrued vacation time in the following year.

In June, 1982, Lily first attempted to change the existing vacation policy by reducing the amount of the vacation benefits by 20%. Later, on about November 4, 1982, Lily sent out a memo, the so-called "Tucker memo,"[3] which purports to restore the 20% reduction pursuant to another change in Lily's vacation policy. This November 4, 1982, change is at the heart of plaintiffs' federal RICO and state law claims.

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[2] The motion to dismiss is only as to the so-called "vacation benefits" claims and the ERISA claims. Thus, the age discrimination claim will not be discussed in this order.

[3] The Tucker memo is erroneously dated November 4, 1983. All parties agree that the actual date of the memo should read November 4, 1982.

The "Tucker memo" states that under the new vacation policy employees must take their vacation in the year it is *earned*, rather than in the following year. The memo states that the new policy will be "implemented January 1, 1983." The memo also states that there will be "no provision to carry over vacation periods earned in one year into the following year," and that "[e]mployees who have existing, untaken vacation entitlements under former policy have until the end of the year (1982) to avail themselves of untaken vacation earned under the old policy." Needless to say, there was a great deal of employee discussion and interest regarding the "Tucker memo."

Plaintiffs allege that sometime prior to September 30, 1982, Lily had already decided to change the vacation policy, and that on September 30th Lily wiped from its books a liability of over $1.3 million dollars which had been earmarked as payment for vacation benefits, thereby converting the money to its own use. Plaintiffs claim that they were neither allowed to take their vacations nor paid their vacation benefits for the year 1982. Plaintiffs allege that officers of Lily used the mails and telephone from June, 1982, through February, 1987, to implement and conceal their actions from Lily's employees. Plaintiffs claim that this conduct constitutes a violation of federal and Georgia RICO laws, breach of trust, tortious conversion and fraud, and breach of contract.

I will now move to the facts surrounding plaintiffs' ERISA claims. As stated earlier, when Lily was formed in 1981 it distributed a memo to those employees who transferred from Owens-Illinois. The memo said that Lily intended to continue providing to those employees the

same benefits they previously enjoyed. Plaintiffs allege that the employees' retirement benefits were among those which Lily pledged to continue and that the Lily-Tulip, Inc. Salary Retirement Plan ("the Plan") was set up to administer these retirement benefits.

In June, 1986, a wholly-owned subsidiary of Fort Howard Paper Company acquired Lily and then merged with another wholly owned subsidiary of Fort Howard Paper Company to form Fort Howard Cup Corporation ("Fort Howard"). Plaintiffs allege that in October, 1986, the Fort Howard Board of Directors voted to amend and then terminate the Plan effective December 31, 1986, but that no notice of the amendments was given. It appears to be undisputed that the Plan was underfunded at the time of its termination.[4]

When the Plan was terminated its participants were sent forms giving them two options as to their retirement benefits. The participants were allowed either to purchase an annuity in the amount of their normal retirement benefit, or to transfer their benefits into a profit sharing plan. Plaintiffs allege that the election forms contained misrepresentations and that the amounts of the participants' benefits were miscalculated in various ways. Plaintiffs further allege that as a result of defendants' misrepresentations many salaried employees involuntarily retired in order to protect their benefits. Lastly,

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[4] Although it is undisputed that the Plan was underfunded in some respects, defendants vigorously dispute the allegation that they were required to fund the so-called contingent early retirement benefit fund. This will be discussed in more detail in the section of my order analyzing plaintiffs' ERISA claims.

plaintiffs allege that the defendants' actions aforementioned constituted a breach of a fiduciary duty.

VACATION BENEFITS CLAIMS

I will now analyze plaintiffs' vacation benefits claims. As stated earlier, plaintiffs allege that Lily's actions in changing its vacation policy in 1982 violated both federal and state RICO laws (Counts One and Two, respectively), and constituted breach of trust (Count Three), tortious conversion and fraud (Count Five), and breach of contract (Count Four). Defendants move to dismiss both RICO claims on the grounds that plaintiffs have failed to allege the requisite pattern of racketeering activity and that their allegations of fraud are not pled with particularity as required under Fed.R.Civ.P. 9. Defendants also contend that the federal RICO claim, as well as the breach of trust claim and the tortious conversion and fraud claim, are barred by the statute of limitations.[5] Lastly, defendants claim that as a matter of law

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[5] In their reply brief defendants invite me to declare the federal RICO statute unconstitutionally vague. Defendants extended this invitation during oral argument and in a footnote contained in the third brief submitted in support of the motion to dismiss. In support of their invitation defendants cite Justice Scalia's concurring opinion in *H.J. Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. ___, 109 S.Ct. 2893, 2906, 106 L.Ed.2d 195 (1989).

With a salute to counsel's eloquence and resourcefulness, I decline defendants' invitation to declare the RICO statute unconstitutionally vague. Neither party has briefed this issue, and the only authority cited in support of the proposition is the aforementioned concurrence in *H.J. Inc.* While my ardent admiration for Justice Scalia is no secret and the RICO statute is far

there was no breach of contract with regards to the November, 1982, changes in Lily's vacation policy. I will begin with the motion to dismiss the RICO claims.

I. RICO CLAIMS

A. *Statute of Limitations*

Defendants first argue that plaintiffs' federal RICO claim is barred by the statute of limitations. In *Agency Holding Corp. v. Malley-Duff and Associates, Inc.*, 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987), the Supreme Court set a four-year statute of limitations on RICO claims.[6] Thus, a plaintiff is not barred from bringing a suit pursuant to RICO where he filed suit within four years of the time he knew or should have known of his injury. *Bowling v. Founders Title Co.*, 773 F.2d 1175 (11th Cir.1985).

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from a model of clarity, I conclude that the statute as interpreted gives fair warning to persons of ordinary intelligence of the prohibited conduct and the persons covered. *See U.S. v. Angiulo*, 897 F.2d 1169 (1st Cir.1990); see also *Buffo v. Graddick*, 742 F.2d 592, 595 (11th Cir.1984) and the cases cited therein.

[6] The pending lawsuit was filed prior to the Supreme Court's ruling in *Agency Holding*. Plaintiffs contend that the ruling in that case is therefore not applicable to the case at bar, citing *Radcliffe v. Founders Title Co.*, 720 F.Supp. 170, 171 (M.D.Ga.1989). The holding in Radcliffe is difficult to apply, since the reasoning therefor is "the case law cited in the portion of plaintiffs' brief dealing with this issue." *Id.* at 175. However, my ruling on the statute of limitations issue makes it unnecessary to decide whether the holding in *Agency Holding* should be applied retroactively.

The complaint in the captioned case was apparently filed in state court in April, 1987, and removed to this court on May 13, 1987. The complaint alleges that plaintiffs were injured as a result of a change in Lily's vacation benefits policy. Defendants claim the Tucker memo, dated November 4, 1982, clearly described the change. Thus, defendants argue that plaintiffs knew or should have known that they were being deprived of their vacation benefits no later than November 4, 1982.

At first glance defendants' argument holds some appeal. However, when one carefully reads the Tucker memo the initial appeal fades. Any vacation policy which allows employees vacation with pay necessarily has two components; the actual vacation from work and the monetary benefit of being paid while away from work. The Tucker memo states that under the new policy "[v]acation . . . is earned" during the current year. The memo then states "vacation *periods* earned in one year" would not be carried over into the following year (emphasis added). While defendants argue that the memo clearly states that any vacation *benefits* not used by December 31, 1982, would be lost, another reasonable interpretation of the memo is that only vacation *time* not used by December 31, 1982, would be lost.

The heart of plaintiffs' complaint is that they were wrongfully deprived of the monetary value of their vacation benefits, not the physical time off from work. Moreover, the complaint alleges that the plaintiffs were not permitted to take any vacation that had accrued as of September 30, 1982. Complaint at p. 5, paragraph 6(c). The Tucker memo is silent as to whether plaintiffs would still be paid if they could not physically take time off

from work as vacation. Hence, the Tucker memo is ambiguous as to whether it applied to both the employees' vacation time away from work and the monetary benefit to which the employees were entitled while on vacation.

Plaintiffs argue that no employee realized that Lily was not going to pay vacation benefits for 1982 until June, 1983, when, for the first time, a retiring employee requested benefits but Lily refused to pay. Under these circumstances, I cannot conclude as a matter of law that plaintiffs knew or should have known of their injury prior to June, 1983. As the complaint was apparently filed in April, 1987, but in any event prior to May 13, 1987 (the date the case was removed to this court), I cannot conclude that the complaint was not filed within four years of the time plaintiffs knew or should have known of their injury.[7]

B. *Pattern of Racketeering Activity*

Defendants next argue that both the federal and state RICO claims should be dismissed on the ground that plaintiffs have failed to allege a pattern of racketeering activity. A "pattern of racketeering activity" is defined as "at least two acts of racketeering activity." 18 U.S.C.

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[7] This conclusion is bolstered by the fact that at this time Lily was a private company, and therefore plaintiffs had no way of knowing that Lily had removed the vacation benefits liability from its books and apparently transferred the money to another account.

§ 1961(5). "Racketeering activity" is any criminal act listed in 18 U.S.C. § 1961(1), and is often referred to as a predicate act. However, two predicate acts, without more, are insufficient to constitute a "pattern" of racketeering activity.

In *H.J., Inc.*, the Supreme Court again attempted to define precisely what "more" is necessary to show a pattern of racketeering activity. Under the dictates of *H.J., Inc.*, in order to show a pattern of racketeering activity a plaintiff must show that the two predicate acts are related and either amount to or constitute a threat of continuing racketeering activity. *H.J., Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. at ___, 109 S.Ct. at 2901.

Predicate acts are "related" if the acts "have the same or similar purposes, results, participants, victims, or methods of results. . . . " *Id.* Plaintiffs allege that Lily and its agents used the mails and telephone from June, 1982, through December, 1982, to alter the company's financial records and to intentionally misrepresent to its employees the status of their vacation benefits. Plaintiffs allege that defendants used the mails and telephone at least through February, 1987, to implement and conceal their fraud. Use of the mails and telephones to defraud constitutes predicate acts under section 1961(1).

There can be little doubt that the alleged predicate acts are "related" under *H.J., Inc.* Plaintiffs allege that the victims of all predicate acts were Lily salaried employees, and that Lily and its agents participated in the predicate acts, and that the purpose and result of the predicate acts was to wrongfully deprive plaintiffs of their vacation benefits and conceal defendants' actions from them.

Determining whether defendants' alleged predicate acts either amount to or constitute a threat of continuing racketeering activity is not so straightforward. *See Atlas Pile Driving Co. v. DiCon Financial Co.*, 886 F.2d 986, 994 (8th Cir.1989) ("The concept [of continuity] is more difficult to define" than is the concept of relatedness). "Continuity is both a closed-and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* ___ U.S. at ___, 109 S.Ct. at 2902. This element of a RICO claim may be satisfied by showing either "a series of related predicates extending over a substantial period of time," or the threat that past racketeering activity will continue. *Id.*

The complaint alleges that defendants used the mails in June, November and December, 1982, to alter Lily's financial records and to distribute "memoranda to implement the defrauding of the plaintiffs' vacation benefits." The complaint further alleges that defendants "continued to use the mails at least through February, 1987, to misrepresent the status of the vacation benefits" in order to keep the employees from taking legal action regarding their vacation benefits. Complaint at p. 8-9, paragraph 4.

Defendants argue that the alleged scheme only ran from June, 1982, through December 31, 1982, at which time the alleged scheme was completed by Lily erasing the liability for plaintiffs' vacation benefits from its books. Thus, defendants contend that plaintiffs have only alleged a scheme which extended over a "few weeks or months" and which threatened no future criminal conduct, and have therefore not alleged a "pattern of racketeering activity." *Id.* at ___, 109 S.Ct. at 2902.

I cannot accept defendants' arguments. First, while the scheme may have been complete for bookkeeping purposes at the time the liability for vacation benefits was wiped off Lily's books, courts should adopt "a common-sensical, fact-specific approach to the pattern requirement." *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir.1989). Common sense indicates that the scheme could not be complete until those employees eligible for the benefits attempted to collect but were refused the benefits.

Furthermore, some of the facts which the courts may consider in determining whether a pattern of racketeering activity has been alleged are the length of time the alleged scheme covers, the number of victims and the occurrence of distinct injuries. *See Sutherland v. O'Malley*, 882 F.2d 1196 (7th Cir.1989). In this sense the alleged scheme is ongoing, i.e. open, because the plaintiff class consists of all employees who were eligible for vacation benefits for the year 1982, some of whom may not have yet attempted to collect their vacation benefits for that year. Further, the scheme as alleged extends at least through February, 1987, and had numerous victims who each allegedly suffered a distinct injury.

Additionally, plaintiffs allege that through February, 1987, defendants engaged in predicate acts which were intended to and had the effect of concealing Lily's conduct from its employees. Plaintiffs allege that these predicate acts were designed to misrepresent to the employees that nothing had changed and that they would still receive their vacation benefits, thereby keeping the employees from taking legal action regarding defendants' actions. This activity can also constitute predicate acts.

See Morley v. Cohen, 888 F.2d 1006 (4th Cir.1989), *citing United States v. Maze*, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974); *see also Sun Savings and Loan Association v. Dierdorff*, 825 F.2d 187, 196 (9th Cir.1987) (defendant's four mailings constituted part of allegedly fraudulent scheme where "the effect of the mailings was to prevent the development of any suspicion about [defendant's activities] and thus keep [plaintiff] ignorant of [defendant's] activities"). Thus, plaintiffs have also alleged a closed-ended scheme running from June, 1982, through February, 1987.

A scheme which ends after a fixed period of time satisfies the continuity element of the pattern of racketeering activity requirement if the scheme's predicate acts continue over "a substantial period of time." *H.J., Inc.* ___ U.S. at ___, 109 S.Ct. at 2902. There can be little doubt that a scheme from June, 1982, through February, 1987, is a sufficiently "substantial period of time" to satisfy this element. *See Atlas Pile Driving Co.*, 886 F.2d at 994 ("conduct [that] lasted over three years" is sufficient). Accordingly, I conclude that the complaint sufficiently alleges a pattern of racketeering activity.

Although I conclude that the alleged conduct constitutes a "pattern of racketeering activity," there is substantial ground for disagreement as to this issue. *Compare Hutchinson v. Wickes Companies, Inc.*, 726 F.Supp. 1315 (N.D.Ga.1989); *Disandro-Smith & Associates v. Edron Copier Service, Inc.*, 722 F.Supp. 912 (D.R.I.1989). Many Circuits, including the Eleventh Circuit, have yet to address the "pattern" requirement in light of *H.J., Inc.* Given this lack of guidance, and the inconsistency among the few reported cases, I conclude that whether plaintiffs have

alleged a "pattern of racketeering activity" is a controlling issue of law[8] as to which there is substantial ground for a difference of opinion.

Moreover, an immediate appeal of this issue will materially advance the ultimate termination of the litigation. A substantial amount of the time the parties spend on discovery will no doubt be directed towards the RICO claim. Likewise, a substantial portion of any trial will also be devoted to the RICO claim. Accordingly, whether the plaintiffs have alleged a "pattern of racketeering activity" is a controlling issue of law as to which there is substantial ground for a difference of opinion, and an immediate appeal of this issue will materially advance the ultimate termination of the litigation.

C. *Failure to Plead Fraud With Particularity*

Defendants next assert that plaintiffs failed to allege fraud with sufficient particularity to satisfy Fed.R.Civ.P. 9. The alleged predicate acts are mail and wire fraud. Hence, "the circumstances constituting" the alleged predicate acts must be "stated with particularity" under Rule 9. See *Durham v. Business Management Associates*, 847 F.2d 1505 (11th Cir.1988).

However, the pleading requirement of Rule 9 does not "abrogate the concept of notice pleading." *Id.* at 1511. In *Durham* the Eleventh Circuit declined to establish a hard and fast rule for what a complaint must allege to comply with the requirements of Rule 9(b). Rather, while

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[8] The issue is a controlling issue of law because it is presented by a motion to dismiss under Fed.R.Civ.P. 12(b).

the Court stated that allegations of "date, time or place satisfy the Rule 9(b) requirement . . . alternative means are also available to satisfy the rule." *Id.* at 1512.

The complaint in *Durham* alleged that "[c]orrespondence and other communications concerning [an investment scheme] took place through means or instrumentalities of interstate commerce, including without limitation, the mails. . . . The unlawful actions comprising the [investment scheme] constituted racketeering activity . . . in that such actions constituted . . . mail fraud under 18 U.S.C. § 1341." However, an affidavit from one of the plaintiffs stated that he received documents relating to an investment program "by letter dated December 31, 1979, from Terrance M. Gill," and "[f]rom time to time during the next several years, I received correspondence related to this investment through the mail." This was held sufficient to satisfy the particularity requirements of Rule 9.

In the case at bar the complaint alleges that Lily and its agents ("James Cobb, Kevin Tucker, and other corporate officers") used the mails "in June, November and December, 1982 to alter the financial records of the company and to circulate memoranda to implement" the scheme to convert plaintiffs' vacation benefits, and "continued to use the mails at least through February, 1987 to misrepresent the status of the vacation benefits and thereby avoid the filing of legal actions." Complaint at p. 8-9, paragraphs 3, 4.

The complaint also alleges that Lily through its Industrial Relations Department "uniformly advised employees" that the change "would not work an adverse

effect on employees since annual vacation time off with pay would be received in 1982 and 1983 in the same amounts as prior to the policy change, that ultimately there was no loss of benefits for the employees, and that the change was primarily for accounting purposes only." *Id.* at p. 6, paragraph 6(f).

Construing the above allegations liberally and in favor of the pleader, I conclude that the allegations of fraud are pleaded with sufficient particularity to pass muster under Rule 9(b). Plaintiffs' allegations of fraud are more particular than the allegations in *Durham.* The complaint alleges that between June and December, 1982, defendants communicated through the mails and telephones to plan and implement the changes in the vacation policy, and to wipe the liability for vacation benefits off its books and convert these funds to their own use. *See also Formax, Inc. v. Hostert,* 841 F.2d 388, 391 (Fed.Cir.1988) (Court held that plaintiff's RICO claim sufficiently pleaded mail/wire fraud where plaintiff alleged "the content of the communications, the particular defendants, and the scheme to defraud").

Moreover, while the allegations of fraud from December, 1982, through February, 1987, are far from a model of particularity,[9] the allegations do state who made the allegedly fraudulent representations (Lily's Industrial

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[9] While I agree with plaintiffs that discovery would be required to allege certain fraudulent acts with more particularity, much of the information needed for more particularized allegations of fraud (such as when defendants communicated with plaintiffs and the contents of the communications) should be within the knowledge of the plaintiffs.

Relations Department); the reasons why the representations were fraudulent;[10] and that the representations were made to conceal defendants' actions from plaintiffs. The complaint also alleges the general time frame in which the misrepresentations were allegedly made, that the mails were used to communicate the misrepresentations (see also Exhibit 6 to the Hagen affidavit), and it describes the alleged scheme in considerable detail.

Under these circumstances, I cannot conclude that plaintiffs have failed to plead fraud with sufficient particularity to put defendants on notice of what it is the plaintiffs claim constitutes fraud. *Compare Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir.1989) (plaintiff did not allege mail/wire fraud with sufficient particularity because she did not "identify the contents of any communications" nor "explain how the communications advanced the alleged scheme of the defendants to defraud her"); *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1393 (9th Cir.1988) (plaintiff only alleged "many acts of mail fraud" and "many acts of wire fraud"); *Ray v. Karris*, 780

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[10] Defendants argue that the representations are not even alleged to be false because the complaint only alleges that the vacation plan was covered by ERISA, which at the time of the alleged misrepresentation was merely a good faith application of existing law. I concur with defendants that at the time of the alleged misrepresentation the question of whether vacation benefits were covered by ERISA was not settled. However, in making this argument defendants apparently ignore the rest of this paragraph of the complaint, which alleges that defendants represented that employees would not lose their vacation benefits, that they would eventually receive these benefits, and that the change was primarily for accounting purposes.

F.2d 636, 644 (7th Cir.1985) (allegations that the defendants "at least twice used, or caused to be used, mail delivered by the United States Post Office" and the defendants "at least twice communicated, or caused communications to be made, by wire and interstate commerce" held to be insufficient). Based on the foregoing, the motion to dismiss the RICO claims (contained in Counts One and Two) is DENIED.

Again, however, I recognize that this is a controlling issue of law as to which there is substantial ground for difference of opinion. The rule in *Durham*, that while allegations of date, time or place satisfy the Rule 9(b) particularity requirement, "alternative means are also available to satisfy the rule," is analytically difficult to apply. Moreover, it appears that other Circuits have placed more stringent pleading requirements upon plaintiffs alleging fraud than the *Durham* Court appears to. *See Formax, Inc.*, 841 F.2d 388 (applying 7th Cir. law); *Lally v. Crawford County Trust & Savings Bank*, 863 F.2d 612, 613 (8th Cir.1988) ("litigant must allege the time, place and content of all false representations); *Schreiber Distributing v. Serv-Well Furniture, Co.*, 806 F.2d 1393, 1401 (9th Cir.1986) ("We have interpreted Rule 9(b) to mean that the pleader must state the time, place and specific content of the false representations as well as the identities of the parties"). Accordingly, I conclude that the issue of whether plaintiffs pled fraud as predicate acts with sufficient particularity under Rule 9(b) is a controlling question of law as to which there is substantial ground for difference of opinion, and for the reasons stated in section I(B) of this order an immediate appeal of this issue

will materially advance the ultimate termination of the litigation.

II. BREACH OF TRUST CLAIMS

The next claim to be addressed is plaintiffs' breach of trust claim contained in Count Three. A constructive trust is implied wherever one party obtains through fraud, title to property rightfully belonging to another. *Murray County v. Pickering*, 196 Ga. 208, 26 S.E.2d 287 (1943). Plaintiffs claim that defendants obtained through fraud plaintiffs' vacation benefits, and hence that defendants hold in constructive trust for plaintiffs the monetary value of the vacation benefits for 1982. Defendants move to dismiss this count on the grounds that the claim is barred by the applicable statute of limitations and there is no trust property or *res*.

Defendants argue that the applicable statute of limitations on this claim is four years from the time the plaintiff discovers or through the exercise of reasonable diligence should have discovered the fraud. In support of their argument defendants cite *Skinner v. Dekalb Federal Savings & Loan Association*, 246 Ga. 561, 272 S.E.2d 260 (1980). However, in making their argument defendants conveniently ignore O.C.G.A. § 9-3-27 (1982), which provides that the statute of limitations for actions against a trustee is ten years. This is applicable to actions for breach of constructive trust. *See Murray County v. Pickering*, 196 Ga. 208, 217, 26 S.E.2d 287 (1943), citing *O'Neal v.*

O'Neal, 176 Ga. 418, 168 S.E. 262 (1933). The complaint was filed well within the ten-year period.[11]

Defendants also argue that there is no trust *res* because plaintiffs were not entitled to the vacation benefits at the time the vacation policy was changed. Defendants phrase their argument in terms of a trust *res*. However, they actually argue that since vacation was not earned under the existing policy until December 31, plaintiffs had no right to the vacation benefits until that date. Hence, defendants claim, the benefits did not belong to the plaintiffs, and therefore there can be no constructive trust.

Defendants make essentially the same argument in support of their motion to dismiss plaintiffs' breach of contract claim. For reasons I will enumerate in the portion of this order disposing of the motion to dismiss the breach of contract claim, I cannot conclude that plaintiffs had no right to any portion of the vacation benefits for the year 1982 prior to December 31, 1982. Thus, the motion to dismiss the breach of trust claim in Count Three is DENIED.

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[11] Even accepting defendants claim as to the applicable statute of limitations, the motion to dismiss Count III could not be granted on this ground. In a claim for breach of constructive trust, the statute of limitations begins to run from the time the alleged owner of the property knows or should know that "the person in possession claims adversely to him." *Id.* For the reasons stated in my analysis of defendants' statute of limitations argument as to plaintiffs' federal RICO claim, I cannot determine as a matter of law that this date is prior to June, 1983.

III. TORTIOUS CONVERSION AND FRAUD

Count Five of the complaint is a claim for tortious conversion and fraud. Once again, defendants argue that the claim is barred by the statute of limitations. Once again, I cannot accept defendants' argument.

The statute of limitations applicable to Count Five is four years from the time the cause of action "accrues." O.C.G.A. § 9-3-31. Defendants concede that a cause of action "accrues" on the date the alleged fraud is discovered, or through the exercise of reasonable diligence should have been discovered. Defendants' Brief in Support of the Motion to Dismiss at 23; *see McNeal v. Paine, Webber, Jackson & Curtis*, 598 F.2d 888 (5th Cir.1979). As I stated in the section of this order rejecting defendants' statute of limitations arguments as to plaintiffs' federal RICO claim, and for the reasons stated therein, I cannot conclude that plaintiffs should have discovered the alleged fraud prior to June, 1983. As this suit was filed within four years from that date, Count Five is not barred by the statute of limitations. Accordingly, the motion to dismiss Count Five is DENIED.

Defendants have asserted the statute of limitations as a defense to plaintiffs federal RICO, tortious conversion and fraud, and breach of trust claims, as contained in Counts One, Three and Five of the vacation benefits claims. It is undisputed that the statute of limitations applicable to the federal RICO and tortious conversion and fraud claims is four years. Moreover, it is far from clear that plaintiffs filed their complaint within four years from the date they knew or should have known of the existence of their claims. The "Tucker memo" at least

arguably announced defendants' actions in November, 1982. Furthermore, the alleged scheme or conversion arguably occurred in December, 1982, more than four years from the date the complaint was filed. Thus, whether plaintiffs' federal RICO, and tortious conversion and fraud claims are time-barred are controlling questions of law as to which there is substantial ground for a difference of opinion.

Additionally, since this issue permeates most of plaintiffs' vacation claims, and for the reasons stated in section I(B) of this order, I conclude that an immediate appeal of this issue would materially advance the ultimate termination of the litigation. Accordingly, the issues of whether plaintiffs' federal RICO or tortious conversion and fraud claims are time-barred are certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

IV. BREACH OF CONTRACT

The last claim relating to plaintiffs' vacation benefits is a claim for breach of contract (Count Four). Plaintiffs claim that by depriving them of their vacation benefits for the year 1982, Lily breached a contract to provide vacation benefits to plaintiffs. However, defendants argue that under the vacation policy as it existed at the time of the change, vacation benefits for 1982 were not earned until December 31, 1982. Thus, defendants claim that plaintiffs had no right to the benefits until that time, and that Lily therefore had the right to take away those benefits.

Plaintiffs allege that they had "earned" vacation benefits for 1982 as of September 30, 1982. Complaint at p. 11, paragraph 2. Plaintiffs also allege that employees who terminated employment during a year would receive a portion of the vacation benefits for the year of termination. Complaint at p. 3, paragraph 4.

Conversely, defendants argue that the vacation policy unambiguously states that vacation is not earned for a given year until December 31 of that year. However, construing the policy against the defendants, I conclude that the policy is ambiguous as to exactly when during a year an employee "earned" vacation benefits under the policy. Plaintiffs allege that employees who terminated employment during the course of a year received at least some of their vacation benefits for that year. Moreover, the policy does not state that employees do not earn any vacation *benefits* prior to December 31; rather, it states that employees "qualify" for *vacation* as of that date. Construing the vacation policy against Lily, I conclude that the policy is ambiguous as to whether employees had a right to any vacation benefits for the year 1982 prior to December 31, 1982. Thus, I cannot determine as a matter of law that the contract allowed Lily to take away plaintiffs' vacation benefits for the year 1982 at any time prior to December 31, 1982. Accordingly, the motion to dismiss Count Four is DENIED.

ERISA CLAIMS

Plaintiffs also claim that the defendants violated numerous provisions of ERISA when defendants terminated the Lily Tulip, Inc. Salary Retirement Plan ("the

Plan") effective December 31, 1986. It is difficult to determine exactly what causes of action plaintiffs assert. Moreover, it appears that several of the counts in the ERISA section of the complaint overlap.[12] It also appears that several claims have become moot as a result of developments occurring subsequent to the filing of the motion to dismiss. Accordingly, I will rule on the motion as it pertains to the various groups of claims, rather than analyzing each count separately, first addressing whether any of plaintiffs' ERISA claims are now moot. However, when it appears that an entire count is devoted to a single claim, I will refer to that specific count.

In their brief in opposition to defendants' motion to communicate with putative class members, plaintiffs state that in amending the proposed payment of benefits pursuant to termination of the Plan, defendants have "agreed" to use Plan section 1.33(b) rather than section 1.33(c) in calculating benefits and to use the mortality tables and interest rates which plaintiffs alleged defendants should have used in calculating benefits. Based on

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[12] For example, Count Five alleges "that the benefits promised by the defendants in writing to employees and included in the written Plan document to the extent not inconsistent with the Internal Revenue Code provisions for a qualified retirement plan . . . form part of the participants-employees' contract of employment and are enforceable regardless of the plan's funding status." The requested relief is that the Court "enforce the contractual rights of all participants under said retirement plan . . . " This appears to be a general, all-encompassing "reallegation" of the other allegations in this section of the complaint. Conversely, Count Nine appears to be a specific "reallegation" of the other allegations in this section of the complaint.

the foregoing, it appears that Count Four of the complaint (asking for an order requiring defendants to calculate plaintiffs' optional lump sum benefits "using PBGC interest rate assumptions") and Count Six (asking for an order requiring defendants to calculate benefits using the social security offset in Plan section 1.33(b) rather than the offset in Plan section 1.33(c)) are moot. Accordingly, Counts Four[13] and Six are DISMISSED.

Although the changes which defendants have agreed to have rendered certain of plaintiffs' claims moot, the IRS determination has no "effect on other Federal . . . statutes." Accordingly, I must now consider the remainder of plaintiffs' ERISA claims.

The first group of claims is that defendants, upon termination of the Plan, failed to pay early retirement subsidy benefits to the Plan's participants. This claim appears to be asserted in Counts Three and Eight in the ERISA section of the complaint. Plaintiffs seek an order requiring defendants to pay these benefits, as well as damages for breach of fiduciary duty for failure to fund and pay these benefits.

Under the terms of the Plan, employees could retire prior to age 65 and receive unreduced benefits if they met certain conditions. Under the Plan, a participant could

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[13] Count Four of the complaint is titled "Use of Plan Assets for Participants Only," yet seems to contain plaintiffs' claim that defendants used the wrong social security offset in calculating participants' benefits upon termination of the Plan. On the other hand, Count Two is titled "Social Security Offset," yet seems to be a claim that defendants violated ERISA's exclusive benefit or "anti-inurement" provision.

receive full retirement benefits if he was at least fifty-five years of age and had at least thirty years of service. An employee who was at least fifty-five and who had at least ten years of service could retire at a reduced benefit. The difference between the unreduced and the reduced benefit for early retirees is the subsidy. The benefit is "contingent" because the plaintiffs had not fulfilled all the requirements for becoming entitled to the unreduced early retirement benefit.

When the Plan was terminated the participants were given the option of receiving their benefits in a lump sum or in the form of an annuity. Plaintiffs contend that the defendants did not pay as part of the benefits the contingent retirement benefit subsidy described above. Plaintiffs contend that this benefit had accrued, and that they therefore could not be deprived of the benefit as a result of the Plan's termination. *See* 26 U.S.C. § 411(d)(3). At the time it was terminated the Plan was underfunded.

Section 4044 of ERISA, 29 U.S.C. § 1344, sets out the order in which benefits under a terminated plan must be paid. In *Mead v. Tilley Corp.*, ___ U.S. ___, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989), the Supreme Court held that section 1344 did not create any entitlement to benefits. Rather, in determining whether a participant is entitled to a benefit upon termination of a plan, courts must look to the plan itself and other provisions of ERISA. *Id.* 109 S.Ct. at 2163. The Court specifically withheld ruling on whether early retirement benefits are accrued benefits under other provisions of ERISA. *Id.* at 2164.

Plaintiffs argue that their right to the early retirement subsidy is created by section 8.1 of the Plan, which in

pertinent part contains the same language as 29 U.S.C. § 1054(g). However, both of these provisions only state that an early retirement benefit is treated as "accrued" for purposes of an *amendment* to the Plan. Throughout their briefs plaintiffs refer to the "termination amendment" to the Plan. However, I conclude that termination of a plan is distinct from an amendment to an ongoing plan. *See Ashenbaugh v. Crucible, Inc.*, 854 F.2d 1516 (3rd Cir.1988), *cert. denied* ___ U.S. ___ , 109 S.Ct. 3155, 104 L.Ed.2d 1019 (1989) ("s 1054(g) does not cover partial terminations and so would not apply here"); *compare* 26 U.S.C. §§ 411(d)(3) (applicable to termination of a plan) and 411(d)(6) (applicable to amendment of a plan); Plan §§ 8.1 (amendment of plan) and 8.2 (termination of plan).

I am persuaded by the reasoning in *Ashenbaugh* and *Blessitt v. Retirement Plan for Employees of Dixie Engine*, 848 F.2d 1164 (11th Cir.1988) that early retirement benefits are not accrued benefits under ERISA. Since the language of the Plan is identical to the language of section 1054(g), early retirement benefits are also not accrued under the Plan. Hence plaintiffs were not entitled to these benefits upon termination of the Plan. *See also Bencivenga v. Western Pennsylvania Teamsters and Employers Pension Fund*, 763 F.2d 574 (3rd Cir.1985); *Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406 (4th Cir.1983); *but see Amato v. Western Union International Inc.*, 773 F.2d 1402 (2nd Cir.1985), *cert. dismissed* 474 U.S. 1113, 106 S.Ct. 1167, 89 L.Ed.2d 288 (1986); *American Stores v. American Stores Co. Retirement Plan*, 716 F.Supp. 1392 (D.Utah 1989); Note, *Changing the Rules of the Game: Pension Plan Terminations*

and Early Retirement Benefits, 87 Mich.L.Rev. 1034 (1989).[14] Accordingly, Counts Three and Eight are DISMISSED to the extent they seek to recover the early retirement benefit subsidy.

However, while the Court in *Ashenbaugh* seemed to hold that early retirement benefits were not accrued benefits, in the preceding sentence the Court stated that it did not need to reach this issue to resolve plaintiffs' claim. *Id.* Thus, the "holding" that early retirement benefits are not accrued benefits under ERISA is dicta. Furthermore, the benefits at issue in *Blessitt* were normal, rather than early retirement benefits. Accrued early retirement benefits are distinguishable from normal pension benefits. *Blessitt*, 848 F.2d at 1173, n. 21.

Neither the plaintiffs nor the Court could locate any case which has resolved the question of whether early retirement benefits are accrued benefits under the law applicable to the termination at issue (and thus may not be eliminated pursuant to a plan termination). As stated above, the existing persuasive authority is in conflict. *See* 87 Mich.L.Rev. at 1035. Moreover, the Supreme Court in *Mead* expressly declined to decide this issue. Thus, there is substantial disagreement on this question.

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[14] Plaintiffs correctly note that the relevant cases involve overfunded, rather than underfunded, plans. However, it would be an anomalous result if participants in an underfunded plan were entitled to early retirement benefits upon termination of the plan, while participants in an overfunded plan were not entitled to such benefits before the surplus reverted to the employer.

Additionally, the issue of whether the plaintiffs were entitled to early retirement subsidy benefits upon termination of the Plan is at the heart of plaintiffs' ERISA claims. The complaint contains nine counts which assert claims under ERISA, two of which are now moot. The motion to dismiss cannot be resolved as to Counts One, Two, Three, Five, Eight and Nine without deciding this issue.

Lastly, the issue presented is strictly a legal issue which is raised by a motion to dismiss.[15] Accordingly, I conclude that the issue of whether plaintiffs were entitled to receive early retirement subsidy benefits upon termination of the Plan is a controlling issue of law as to which there is substantial ground for difference of opinion.

Plaintiffs also claim that defendants failed to use the Plan's assets solely for the benefit of the Plan participants in violation of 29 U.S.C. § 1103(c). This claim appears to be contained in Count Two of the complaint. Plaintiffs allege that the defendants intentionally understated the value of some participants' benefits in order to meet the Plan's obligations to other participants. Plaintiffs claim that the assets of the Plan therefore inured to the benefit of the employer and were used other than for the exclusive purpose of providing benefits to the Plan's participants. Plaintiffs also contend that this conduct constitutes a breach of defendants' fiduciary duty to plaintiffs.

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[15] It appears to be undisputed that the benefits at issue were unfunded at the time the Plan was terminated, and the sole issue is whether the provisions of ERISA gave plaintiffs the right to these benefits.

Defendants argue that their actions cannot be said to have violated the "anti-inurement" provision outlined above unless they converted the Plan's funds to their own use, citing *Bass v. Retirement Plan of Conoco, Inc.*, 676 F.Supp. 735, 744 (W.D.La.1988). However, I decline to read section 1103 this narrowly. A plan fiduciary may violate the anti-inurement provision of ERISA without actually converting funds from the plan at issue. *See Leigh v. Engle*, 727 F.2d 113 (7th Cir.1984).

However, to violate section 1103 the defendants' use of the plan's assets must result in a direct gain to the defendants. Here, plaintiff only alleges that the defendants intentionally understated certain liabilities in an underfunded plan, then shifted assets from these liabilities to cover other liabilities. Hence, the claim is that the defendants, in miscalculating benefits and failing to fully fund the Plan, used the Plan's assets to their benefit.

Yet all assets in the Plan were disbursed to the participants. Moreover, the Plan's assets were not used to produce income for defendants, such as the assets being invested in such a way as to result in financial gain to defendants. *See Leigh*, 727 F.2d 113 (plan's assets were invested in corporations which were takeover targets to increase price of target corporations' stock, where defendants owned stock in the target corporations). Rather, the allegation is that defendants failed to fully fund the Plan, and therefore paid some benefits but not others. *See Holliday v. Xerox Corp.*, 732 F.2d 548, 549 (6th Cir.1984) ("the transfer of funds from one pension account to another within the company's pension, and the subsequent use of those funds as a setoff in calculating the retirement

income owed to employees under" a new benefit provided by the plan, does not violate ERISA's anti-inurement provision); *but see Amato*, 773 F.2d at 1414 (section 1103(c) prohibits employers from "eliminat[ing] certain . . . benefits solely for the purpose of using existing assets to meet other obligations under the pension plan").

There is no allegation that defendants *used* the Plan's assets in such a way as to benefit themselves. Any benefit to defendants occurred incidentally as a result of the alleged failure to fully fund the Plan. This claim is distinct from a claim that the assets in the Plan were used in some way to benefit defendants. Accordingly, defendants' conduct did not violate the anti-inurement provisions contained in 29 U.S.C. § 1103(c), and Count Two is DISMISSED.

Again, however, the answer to the question presented is far from clear. There is little authority on this issue (none of which is binding), and as noted above there is authority to support each side's position. Moreover, the issue arises upon defendants' motion to dismiss. Thus, the issue of whether an employer's intentionally understating benefits in order to use plan assets to pay other benefits violates the anti-inurement provision of 29 U.S.C. § 1103(c) is a controlling question of law as to which there exists substantial ground for difference of opinion.

An immediate appeal of the two ERISA issues discussed above will materially advance termination of the

litigation.[16] Although resolution of these two issues would not dispose of plaintiffs' ERISA claims, these are the most complicated issues presented by the complaint. There can be little doubt that the majority of time plaintiffs devote to discovery on their ERISA claims, and the majority of a trial of these claims, would be devoted to these two issues. Accordingly, an immediate appeal would materially advance the termination of the litigation. Three claims remain unresolved in defendants' motion to dismiss plaintiffs' ERISA claims. The first claim, contained in Count Seven of the ERISA section of the complaint, alleges that defendants attempted to prevent participants in the Plan from pursuing their administrative remedies through intimidation and threats. Defendants raise no arguments in support of dismissing this claim. Accordingly, the motion to dismiss Count Seven of the ERISA section of the complaint is DENIED.

The second unresolved claim is that defendants breached their fiduciary duty to plaintiffs in numerous ways, including failing to properly calculate benefits (in several ways), intentionally understating plan liabilities, and misrepresenting to Plan participants that the lump sum benefit and the annuity which were offered upon termination of the plan were equal, and using the Plan's assets for their own benefit. This claim is contained in Count One of the ERISA section of the complaint.

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[16] The sheer size of the entire case strongly shows that an immediate appeal of all issues certified for interlocutory appeal by this order will materially advance the ultimate termination of the litigation. The case involves hundreds of plaintiffs, and the amount of time which discovery, pretrial proceedings and trial would consume would likely be enormous.

A plan fiduciary is required to discharge his duties with the care, skill and diligence of a prudent man acting in a like capacity. 29 U.S.C. § 1104(a). Defendants present no grounds for dismissing this claim. Moreover, the complaint alleges that defendants, upon termination of the Plan, failed to calculate benefits as provided by the terms of the Plan. Such conduct is expressly prohibited by section 1104(a)(1)(D). Hence, Count One cannot be dismissed in its entirety.

However, Count One also alleges that defendants breached a fiduciary duty by failing to pay early retirement benefits, and by violating ERISA's anti-inurement provisions. As I have determined that defendants had no duty to pay such benefits and did not violate the anti-inurement rule, the motion to dismiss Count One is GRANTED as to these two alleged breaches of fiduciary duty. The motion to dismiss Count One is DENIED in all other respects.

The final unresolved claim is plaintiffs' claim that defendants failed to give proper notice to Plan participants upon termination of the Plan.[17] Count Three of the ERISA section of the complaint alleges that defendants failed to give fifteen days notice of an amendment which

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[17] It is difficult to determine exactly what notices plaintiffs claim were deficient. The index to plaintiffs' complaint lists this claim as Count Five. However, the claim appears to be in Count Three. Moreover, the factual allegations for plaintiffs' ERISA claims list numerous other allegedly defective notices, *see* Complaint at pp. 15-17, yet plaintiffs never assert a right to relief for these allegedly defective notices.

terminated the Plan and changed certain actuarial assumptions, in violation of 29 U.S.C. § 1054(h).

On a motion to dismiss, I must construe the pleadings in favor of the pleading party. Plaintiffs allege that on October 30, 1986 the Plan was amended to change actuarial assumptions for purposes of benefit calculation effective December 31, 1986. Plaintiffs further allege that they received no notice of this amendment or its subsequent revision on December 23, 1986. Defendants argue that the complaint alleges that plaintiffs received notice of the amendment on October 31, 1986. However, the complaint only alleges that on October 31 the plaintiffs received a benefit election form pursuant to the Plan's termination. The complaint never alleges that this form contained notice of the change in actuarial assumptions. Accordingly, the motion to dismiss the notice claims in Count Three is DENIED.

CONCLUSION

The motion to dismiss plaintiffs' vacation benefits claims is DENIED in its entirety. The motion to dismiss the plaintiffs' ERISA claims is GRANTED in part and DENIED in part. Counts Four and Six of plaintiffs' ERISA claims are DISMISSED as moot. Counts Two and Eight of the ERISA claims are DISMISSED entirely, and Counts One and Three of the ERISA claims are DISMISSED in part as outlined above.

However, I am of the opinion that the issues of whether plaintiffs have alleged a "pattern of racketeering activity," whether plaintiffs have pled fraud as predicate acts with sufficient particularity, and whether plaintiffs'

federal RICO or tortious conversion and fraud claims are barred by the statute of limitations are all controlling questions of law as to which there is substantial ground for difference of opinion, and an immediate appeal of each of these issues will materially advance the ultimate termination of this litigation.

I am also of the opinion that plaintiffs' claim that they were entitled to early retirement benefit subsidy upon termination of the Plan under the law applicable to the termination at issue, and their claim that defendants violated the anti-inurement provisions of section 1103(c) by understating certain Plan liabilities in order to pay other benefits, both present controlling questions of law as to which there is substantial ground for difference of opinion, and an immediate appeal of these claims would materially advance the ultimate termination of the litigation. Accordingly, these issues are hereby certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

ORDER ENTERED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8686

ALLAN C. ALDRIDGE, DENNIS W. PETERSON and HENRY A. SIERON,

Plaintiffs-Appellants/
Cross-Appellees,

v.

LILY-TULIP, INC. SALARY RETIREMENT PLAN BENEFITS COMMITTEE and FORT HOWARD CUP CORPORATION,

Defendants-Appellees/
Cross-Appellants,

On Appeal from the United States District Court for the Southern District of Georgia – Augusta Division

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BRIEF OF AMICUS CURIAE PENSION BENEFIT GUARANTY CORPORATION

Dated: December 10, 1990

CAROL CONNOR FLOWE
General Counsel
JEANNE K. BECK
Deputy General Counsel
JAMES J. ARMBRUSTER
Assistant General Counsel
GENNICE D. BRICKHOUSE Attorney

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006-1860
(202) 778-8897

Attorneys for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 28-2(b), the Pension Benefit Guaranty Corporation hereby certifies that the following persons, attorneys, parties and companies have an interest in the outcome of this litigation:

Honorable Dudley H. Bowen of the United States District Court for the Southern District of Georgia
Dewey Ballantine
Knox & Zacks, P.C.
Hull, Towill, Norman & Barrett
Sweetheart Cup Company, Inc.
Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee
Fort Howard Corporation
Allan C. Aldridge, Dennis W. Peterson, Henry A. Sieron and other class members

Dated: December 10, 1990

/s/ Gennice D. Brickhouse

CAROL CONNOR FLOWE
General Counsel
JEANNE K. BECK
Deputy General Counsel
JAMES J. ARMBRUSTER
Assistant General Counsel
GENNICE D. BRICKHOUSE
Attorney

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006-1860
(202) 778-8897

Attorneys for Amicus Curiae

STATEMENT REGARDING ORAL ARGUMENT

This appeal involves the interrelationship of complex provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code. It raises issues having consequences on the pension plan termination insurance program administered by the Pension Benefit Guaranty Corporation ("PBGC") under Title IV of ERISA. The PBGC believes that the Court will benefit from oral argument in which the PBGC is permitted to participate. Recently, the Supreme Court, in remanding a case, directed the court of appeals to consider the views of the PBGC concerning Title IV of ERISA rather than "to 'embar[k] upon a voyage without a compass.' " *Mead v. Tilley*, 109 S. Ct. 2156, 2162-63 (1989). The PBGC respectfully requests that it be permitted to participate in oral argument, if any is granted.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8686

ALLAN C. ALDRIDGE, DENNIS W. PETERSON and HENRY A. SIERON,

Plaintiffs-Appellants/
Cross-Appellees,

v.

LILY-TULIP, INC. SALARY RETIREMENT PLAN BENEFITS COMMITTEE and FORT HOWARD CUP CORPORATION,

Defendants-Appellees/
Cross-Appellants,

On Appeal from the United States District Court
for the Southern District of Georgia – Augusta Division

BRIEF OF AMICUS CURIAE PENSION BENEFIT GUARANTY CORPORATION

STATEMENT OF INTEREST

The Pension Benefit Guaranty Corporation ("PBGC") is a wholly owned United States Government corporation established by section 4002 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1302, to administer the pension plan termination insurance program established by Title IV of ERISA, 29 U.S.C.

§ 1301 *et seq.* Title IV was amended by Title XI of the Consolidated Omnibus Budget Reconciliation Act of 1986, known as the Single-Employer Pension Plan Amendments Act of 1986 ("SEPPAA"). Pub. L. No. 99-272, 100 Stat. 237 (1986), and by Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, known as the Pension Protection Act of 1987 ("PPA"), Pub. L. No. 100-203, 101 Stat. 1330 (1987). There is no dispute that the SEPPAA amendments apply with respect to the termination in this case and that the PPA amendments do not apply.[1]

Title IV is the exclusive means of plan termination for defined benefit pension plans. Under SEPPAA, a plan administrator may terminate a pension plan in a "standard termination" and distribute the plan's assets if, *inter alia*, the plan is sufficient on the date of distribution for "benefit commitments (determined as of the termination date)." ERISA § 4041(b)(2)(D)(ii), 29 U.S.C. § 1341(b)(2)(D)(ii). "Benefit commitments" are defined in section 4001(a)(16) of ERISA, 29 U.S.C. § 1301(a)(16), and the distribution must be made in accordance with the asset allocation rules in section 4044 of ERISA, 29 U.S.C. § 1344. ERISA § 4041(b)(3)(A). 29 U.S.C. § 1341(b)(3)(A).

This case raises novel and important issues involving the interrelationship of sections 4001(a)(16) and 4044(a) of Title IV of ERISA, 29 U.S.C. §§ 1301(a)(16) and 1344(a). with section 411(d)(6) of the Internal Revenue Code ("Code"). 26 U.S.C. § 411(d)(6) (and its counterpart in

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[1] ERISA as amended by SEPPAA is codified in 29 U.S.C. § 1001 *et seq.* (Supp. IV 1986). Citations in this brief to 29 U.S.C. are to that edition, unless otherwise noted.

Title I of ERISA, section 204(g) of ERISA, 29 U.S.C. § 1054(g)).[2] Section 411(d)(6) of the Code, 26 U.S.C. § 411(d)(6). was amended by the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 301(a), 98 Stat. 1426, 1450-51 (1984).[3] The district court decided that section 411(d)(6) of the Code is irrelevant because it applies only to plan amendments, and not to plan terminations. The district court was wrong on this issue. Nevertheless, the plaintiffs-appellants are not entitled to the benefits they claim. A decision to the contrary would alter long-accepted and widely applied rules concerning the distribution of assets under Title IV.

Thus, a decision in appellants' favor could upset countless terminations under SEPPAA and spawn numerous other cases like this one. Indeed, although appellants claim only subsidized early retirement benefits, their reasoning, if adopted, will doubtless be relied upon to support even more expansive and disruptive interpretations of the asset distribution rules under Title IV.

Because appellants' contractual claim is based entirely on the incorporation in their pension plan of the

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[2] PBGC's construction of Title IV provisions is entitled to deference. *See PBGC v. LTV Corp.*, 110 S. Ct. 2668, 2679 (1990); *Mead Corp. v. Tilley*, 109 S. Ct. 2156, 2161-62, 2164 (1989); *Blessitt v. Retirement Plan for Employees of Dixie Engine*, 848 F.2d 1164, 1167-68 (11th Cir. 1988) (en banc).

[3] This brief cites to section 411(d)(6) of the Code instead of section 204(g) of Title I of ERISA because the responsibility to interpret and administer these provisions was expressly transferred to the Secretary of the Treasury. ERISA § 3002, 29 U.S.C. § 1202, Reorg. Plan No. 4 of 1978, 43 Fed. Reg. 47713 (1978).

requirements in section 411(d)(6) of the Code, and ignores the termination provisions of Title IV and the plan, it is entirely without merit as well. The PBGC does not address the other issues in the case.

STATEMENT OF JURISDICTION

For its statement of jurisdiction, the PBGC relies on the statements of the Appellants and Appellees.

STATEMENT OF ISSUES

The PBGC's participation in this case is limited to the following issues:

1. Whether section 411(d)(6) of the Internal Revenue Code applies to plan terminations.

2. Whether a plan administrator is required to pay subsidized early retirement benefits to participants not entitled to them under the terms of the plan on the date of plan termination where the assets in the plan at distribution are sufficient only for benefit commitments.

STATEMENT OF THE CASE

This case arose as a result Of the termination Of the Lily-Tulip, Inc. Salary Retirement plan ("Pension Plan" or "Plan"). In October 1986, Lily-Tulip, Inc. (now known as Fort Howard Cup Corporation and referred to herein as "Fort Howard") initiated a standard termination of the Pension Plan in accordance with section 4041(b) of ERISA, 29 U.S.C. § 1341(b). Fort Howard proposed to

terminate the Plan effective December 31, 1986. Because PBGC did not issue a notice of noncompliance under section 4041(b)(2)(C) of ERISA, 29 U.S.C. § 1341(b)(2)(C), the plan administrator was to commence the distribution of assets. However, after participants received their notices of benefit commitments under section 4041(b)(2)(B) of ERISA, 29 U.S.C. § 1341(b)(2)(B), certain participants filed suit against Fort Howard and the plan administrator, the Pension Plan Benefits Committee. Not all benefits have been distributed yet, as a result of this litigation.

The Plan provided actuarially reduced early retirement benefits to certain participants who elected to retire before attaining normal retirement age. No actuarial reduction was made, however, if a participant had 30 years of service and was at least 55 years old, or had 10 years of service and was at least 60. Rather, such participants could retire early and receive full, or "subsidized," early retirement benefits from the Pension Plan. The Pension Committee is obligated to distribute subsidized early retirement benefits to participants who satisfied, as of the date of plan termination, all of the conditions required of them under the provisions of the Plan to establish entitlement. Appellants had not satisfied these conditions when the Plan terminated, and the Plan did not have enough assets to pay these benefits if the appellants were to satisfy them after termination. Nevertheless, relying on section 411(d)(6) of the Code, 26 U.S.C. § 411(d)(6), appellants claim entitlement to subsidized early retirement benefits in the event eligibility is subsequently established. The district court rejected appellants' claim, primarily because the court believed that section 204(g) of

Title I of ERISA and section 411(d)(6) of the Code apply only to plan amendments, not to plan terminations.

SUMMARY OF ARGUMENT

Section 411(d)(6) of the Code, as amended by REA, applies to plan terminations as well as plan amendments. This is clear from the legislative history, and has been the consistent construction of the Internal Revenue Service. Rev. Rul. 85-6, 1985-1 C.B. 133.

Nevertheless, in the circumstances of this case, appellants are not entitled to early retirement subsidies because entitlement was not established as of the date of plan termination. Under SEPPAA, a plan administrator may terminate a pension plan in a standard termination if plan assets are sufficient, when allocated in accordance with section 4044(a) of ERISA, 29 U.S.C. § 1344(a), to provide for all benefit commitments. ERISA § 4041(b)(3), 29 U.S.C. § 1341(b)(3). The benefits appellants claim are not benefit commitments allocable under the first five priority categories in section 4044 of ERISA, 29 U.S.C. § 1344. Instead, they are forfeitable benefits that fall into Category 6. As such, the benefits are required to be paid only to the extent funded by plan assets at date of plan termination. At the time the Plan was terminated, nothing in ERISA required an employer to contribute additional funds to provide early retirement subsidies for which participants had not qualified as of the date of plan termination.

ARGUMENT

SECTION 411(d)(6) OF THE CODE APPLIES TO PLAN TERMINATIONS UNDER TITLE IV OF ERISA, BUT THE BENEFITS APPELLANTS CLAIM ARE NOT BENEFIT COMMITMENTS AND ARE NOT PAYABLE IN THIS CASE.

Section 411(d)(6)(A) of the Code, 26 U.S.C. § 411(d)(6)(A) requires pension plans to provide that the accrued benefit of a participant may not be decreased by an amendment of the plan. REA added the following subparagraph to section 411(d)(6):

> (B) Treatment of certain plan amendments. – For purposes of subparagraph (A), a plan amendment which has the effect of –
>
> (i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (ii) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

Code § 411(d)(6). 26 U.S.C. § 411(d)(6).

Contrary to the district court's holding, section 411(d)(6) of the Code clearly applies to plan terminations as well as to plan amendments. The initial House version of REA included an express exception from the substantive requirements of section 411(d)(6) for terminating plans. H.R. 4280, 98th Cong., 2d Sess. § 301(a)(1). 130

Cong. Rec. 13316, 13323 (1984). That exception was eliminated by subsequent Senate amendments, and the Senate Finance Committee Report makes clear that the bill enacted is fully applicable to plan terminations. As the Report states:

> The [Senate] bill does not provide an exception to the prohibition against reduction of benefits or elimination of benefit options *in the case of a terminated plan.*
>
> Accordingly, a plan is not to be considered to have satisfied all of its liabilities to participants and beneficiaries until it has provided for payment of conditional liabilities with respect to a participant who, *after the date of the termination of a plan,* meets the requirements for a subsidized benefit.

S. Rep. No. 575, 98th Cong., 2d Sess. 31 n.8, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2577 (emphasis added). As Senator Dole stated when he reported the bill from the Committee for floor consideration, the legislation was intended "to assure that employees who have accrued retirement benefits will not lose these benefits when an employer amends or *terminates* a pension plan." 130 Cong. Rec. 22492, 22501 (1984) (emphasis added). *See also* 130 Cong. Rec. 23472, 23489 (1984) (statement of Representative Roukema).

The Internal Revenue Service thus has construed section 411(d)(6) of the Code, as amended by REA, to apply to plan terminations, Rev. Rul. 85-6, 1985-1 C.B. 133, and the provision's coverage of terminations has not previously been questioned. *See Blessitt,* 848 F.2d 1164.

Nevertheless, the appellants are not entitled to the benefits they claim in the circumstances of this case. This is clear not only from Title IV's termination provisions, but also from sections 411(d)(3) and 411(d)(6) of the Code, 26 U.S.C. §§ 411(d)(3) and 411(d)(6).

Under SEPPAA, a plan may terminate in a standard termination if, *inter alia*, "when the final distribution of assets occurs, the plan is sufficient for benefit commitments (determined as of the termination date)." ERISA § 4041(b)(1), 29 U.S.C. § 1341(b)(1). Section 4001(a)(16) of ERISA, 29 U.S.C. § 1301(a)(16), defines "benefit commitments" to exclude subsidized early retirement benefits in cases like this where participants have not satisfied the age and service requirements before termination. Under that provision, benefit commitments include:

> all benefits provided by the plan with respect to the participant or beneficiary which –
>
> . . . .
>
> (C) constitute –
>
> (i) early retirement supplements or subsidies. . . .
>
> *if the participant or beneficiary has satisfied, as of [the date of plan termination], all of the conditions required of him or her under the provisions of the plan to establish entitlement to the benefits,* except for the submission of a formal application, retirement, completion of a required waiting period subsequent to application for benefits, or designation of a beneficiary.

ERISA § 4001(a)(16), 29 U.S.C. § 1301(a)(16) (emphasis added).

If PBGC has "reason to believe that the plan is not sufficient for benefit commitments," the agency must issue a notice of noncompliance. ERISA § 4041(b)(2)(C), 29 U.S.C. § 1341(b)(2)(C). Receipt of such a notice precludes distribution. However, if no notice is issued, "the plan administrator shall commence the final distribution of assets pursuant to the standard termination . . . as soon as practicable." ERISA § 4041(b)(2)(D), 29 U.S.C. § 1341(b)(2)(D). In connection with any final distribution of assets, "the plan administrator shall distribute the assets in accordance with section 4044." *Id.* And, in distributing such assets, the plan administrator shall:

> (i) purchase irrevocable commitments from an insurer to provide the benefit commitments under the plan and all other benefits (if any) under the plan to which assets are required to be allocated under section 4044, or
>
> (ii) in accordance with the provisions of the plan and any applicable regulations of the corporation, otherwise fully provide the benefit commitments under the plan and all other benefits (if any) under the plan to which assets are required to be allocated under section 4044.

ERISA § 4041(b)(3), 29 U.S.C. § 1341(b)(3).

Section 4044 of ERISA, 29 U.S.C. § 1344, is a key provision of Title IV of ERISA governing the distribution of plan assets at plan termination. It was enacted in conjunction with section 4022 of ERISA, 29 U.S.C. § 1322, which requires the PBGC to guarantee certain plan benefits in the event of plan termination. Subject to specified limitations in section 4022, the PBGC guarantees the payment of all "nonforfeitable benefits" accrued under the

terms of a defined benefit plan at the time of termination. 29 U.S.C. § 1322(a). A "nonforfeitable benefit" means, "with respect to a plan, a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of [ERISA]. . . . " ERISA § 4001(a)(8). 29 U.S.C. § 1301(a)(8); 29 C.F.R. § 2618.2. The nonforfeitable benefits guaranteed by the PBGC are included in the "benefit commitments" defined in section 4001(a)(16), 29 U.S.C. § 1301(a)(16). Benefit commitments, however, also include nonforfeitable benefits in excess of the PBGC's guarantee. ERISA § 4001(a)(16)(B), 29 U.S.C. § 1301(a)(16)(B). And, as previously explained, benefit commitments include early retirement subsidies, but only if participants have satisfied, as of the date of plan termination, all of the conditions for entitlement. ERISA § 4001(a)(16)(C). 29 U.S.C. § 1301(a)(16)(C).

Section 4044(a) of ERISA, 29 U.S.C. § 1344(a), establishes a six-tier allocation scheme for the distribution of plan assets available to provide benefits at termination. As this Court explained in Blessitt, "The six priority categories range from Category 1, which has the narrowest scope and highest priority, to Category 6, which has the broadest scope and lowest priority." 848 F.2d at 1168. The scope of the categories, as summarized in Blessitt, is as follows:

> *Category 1*: The portion of an employee's accrued benefits derived from voluntary employee contributions.
>
> *Category 2*: The portion of an employee's accrued benefits derived from mandatory employee contributions.

> *Category 3*: Annuity benefits that were or could have been in "payout" status three years before the plan terminated. (i.e., benefits that retired workers were receiving or could have received had they chosen to retire within the three years immediately prior to the termination date).
>
> *Category 4*: All other benefits guaranteed by the PBGC.
>
> *Category 5*: "[A]ll other nonforfeitable benefits under the plan."
>
> *Category 6*: "[A]ll other benefits under the plan."

Blessitt, 848 F.2d at 1168 (citing in part and quoting in part section 4044(a) of ERISA, 29 U.S.C. § 1344(a)).

Under this scheme, plan assets must be used to satisfy all claims within a particular category before being distributed to the next lower priority category. 29 C.F.R. § 2618.10(d). If the assets are insufficient to satisfy all claims within a particular category, the assets are distributed pro rata among those claims. 29 C.F.R. § 2618.10(e). Any assets remaining after satisfaction of all liabilities in Categories 1 through 6 may revert to the employer if the plan specifically allows such a reversion and the distribution is not otherwise unlawful. ERISA § 4044(d), 29 U.S.C. § 1344(d); *Blessitt*, 848 F.2d at 1169.

Under Title IV the nonforfeitable benefits that the PBGC guarantees are included within priority Categories 1 through 4. ERISA § 4044(a)(1)-(4), 29 U.S.C. § 1344(a)(1)-(4). Benefit commitments in excess of the guarantee are included within priority Category 5. Category 6, on the other hand, includes all other benefits. It includes benefits accrued but not yet vested under the

terms of a plan before termination. *Mead Corp. v. Tilley*, 109 S. Ct. at 2163; *Blessitt*, 848 F.2d at 1177.

The appellants had not satisfied all of the conditions for entitlement to subsidized early retirement benefits before termination. The benefits they claim therefore are not nonforfeitable benefit commitments. ERISA § 4001(a)(8), (a)(16), 29 U.S.C. § 1301(a)(8), (a)(16). Consequently, the benefits do not fall within Categories 1 through 5. They therefore are distributable, if at all, under Category 6.[4] In standard terminations under SEPPAA, however, Category 6 benefits are paid only if plan assets are available on the date of distribution. Nothing in Title IV, or elsewhere in ERISA or the Code, requires a plan administrator to contribute extra funds at or after termination to pay Category 6 benefits.

Section 411(d)(6) of the Code provides that early retirement subsidies shall be "treated as . . . accrued benefits" with respect to participants who satisfy the conditions for entitlement either before or after termination. Accrued nonvested benefits are included in priority Category 6. *See Mead v. Tilley*, 109 S. Ct. at 2163; ERISA § 4044(a)(6), 29 U.S.C. § 1344(a)(6); PBGC Opinion Letter 87-11, 15 Pens. Rep. (BNA) No. 5 at 260 (Feb. 1, 1988).

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[4] Congress made clear that REA was not intended to "chang[e] the liability of the PBGC for guaranteed benefits." S. Rep. No. 575, *supra* at 31, 1984 U.S. Code Cong. & Admin. News at 2577. Accordingly, the early retirement subsidies appellants claim cannot be in the first four priority categories. Nor, because eligibility was not established as of the date of plan termination, can such benefits be in Category 5. The benefits therefore must be forfeitable benefits included in Category 6 that may become nonforfeitable after termination.

LEXIS, Labor library, PBGC file. The benefits included within Category 6 are protected, if at all, by section 411(d)(3) of the Code, 26 U.S.C. § 411(d)(3). As a condition of tax qualification under section 401(a) of the Code, 26 U.S.C. § 401(a), section 411(d)(3) of the Code requires plans to provide that "the rights of all affected employees to benefits accrued to the date of . . . termination . . . *to the extent funded* . . . are nonforfeitable." 26 U.S.C. § 411(d)(3) (emphasis added).[5] Section 411(d)(3) of the Code thus "vest[s] certain unvested employee benefits for workers who would otherwise be left out in the cold." *Chait v. Bernstein*, 835 F.2d 1017, 1021 (3d Cir. 1987). The protections of that provision, however, apply only to the extent that plan assets are available on that date. 26 U.S.C. § 411(d)(3). The PBGC's asset allocation regulation logically assigns these benefits to Category 6, where they literally will be paid only to the extent funded. 29 C.F.R. § 2618.10, 2618.16.

Thus, clearly, nothing in ERISA or the Code provides the appellants with a right to the early retirement subsidies they claim in this case. The assets available for the payment of benefits, when distributed in accordance with section 4044 of ERISA, are sufficient only for the benefit

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[5] Under section 4022 of ERISA, the PBGC does not guarantee "benefits becoming nonforfeitable solely on account of the termination of a plan," 29 U.S.C. § 1322(a), as required by section 411(d)(3) of the Code. Thus, as the Supreme Court has stated, the "PBGC has consistently maintained that for purposes of its guarantee and of asset allocation under section 4044(a), the characterization of benefits as forfeitable or nonforfeitable depends upon their status before plan termination." *Mead v. Tilley*, 109 S. Ct. at 2163.

commitments included in Categories 1 through 5. Because the benefits claimed in this case are assigned to Category 6 and were not funded at termination of the Plan, the appellants simply have no cognizable claim to them. Code § 411(d)(3), 26 U.S.C. § 411(d)(3).

CONCLUSION

This Court should affirm the district court's judgment that Fort Howard is not required by ERISA or the Code to provide the subsidized early retirement benefits appellants seek, but for the reasons stated above rather than the reasons given by the district court.

Respectfully submitted,

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/s/ Gennice D. Brickhouse
CAROL CONNOR FLOWE
General Counsel
JEANNE K. BECK
Deputy General Counsel
JAMES J. ARMBRUSTER
Assistant General Counsel
GENNICE D. BRICKHOUSE
Attorney

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006-1860
(202) 778-8897

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Amicus Curiae Pension Benefit Guaranty Corporation was sent via Federal Express this 10th day of December 1990, to each of the following counsel of record:

William F. Hammond, Esq.
Hull, Towill, Norman & Barrett
Seventh Floor
Trust Company Bank Building
Augusta, Georgia 30913

Ted H. Clarkson, Esq.
Knox & Zacks, P.C.
1400 First Union Bank Building
Augusta, Georgia 30903

Sanford M. Litvak, Esq.
Dewey Ballantine
1301 Avenue of the Americas
New York, New York 10019-6092

/s/ Gennice D. Brickhouse
GENNICE D. BRI
Attorney
PENSION BENEFIT GUARANTY CORPORATION
Office of the General Counsel
2020 K Street, N.W.
Washington, D.C. 20006-1860
(202) 778-8897

A. STATUTORY PROVISIONS INVOLVED

1. ERISA §204(g)

29 U.S.C. §1054. Benefit accrual requirements

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of –

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

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2. ERISA §302(c)(8)
29 U.S.C. §1082 (c) Methods

(8) For purposes of this part, any amendment applying to a plan year which –

(A) is adopted after the close of such plan year but no later than 2½ months after the close of the plan year (or, in the case of a multiemployer plan, no later than 2 years after the close of such plan year),

(B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and

(C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances,

shall at the election of the plan administrator, be deemed to have been made on the first day of such plan year. No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship (as determined under section 1083(b) of this title) and that waiver under section 1083(a) of this title is unavailable or inadequate.

3. ERISA §402(a)
29 U.S.C. §1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. . . .

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4. ERISA §502(a)
29 U.S.C. 1132 Civil enforcement
(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

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5. **ERISA §3002(c)**
29 U.S.C. §1202 (C) **Extended application of regulations prescribed by Secretary of Treasury relating to minimum participation standards, minimum vesting standards, and minimum funding standards.**

Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter. Except as otherwise expressly provided in this chapter, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the

Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411, and 412 of Title 26.

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6. ERISA §4041(a) and (b)
29 U.S.C. §1341 Termination of Single-employer Plans.

(a) General Rules Governing Single-Employer Plan Terminations. –

(1) Exclusive Means of Plan Termination. – Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 4042, a single-employer plan may be terminated only in a standard termination under subsection (b) or a distress termination under subsection (c).

(2) 60-day Notice of Intent to Terminate. – Not less than 60 days before the proposed termination date of a standard termination under subsection (b) or a distress termination under subsection (c), the plan administration shall provide to each affected party (other than the corporation in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

(3) Adherence to Collective Bargaining Agreements. – The corporation shall not proceed with a termination of a plan under this section if the termination

would violate the terms and conditions of an existing collective bargaining agreement. Nothing in the preceding sentence shall be construed as limiting the authority of the corporation to institute proceedings to involuntarily terminate a plan under section 4042.

(b) Standard Termination of Single-Employer Plans. –

(1) General Requirements. – A single-employer plan may terminate under a standard termination only if –

(A) the plan administrator provides the 60-day advance notice of intent to terminate to [sic] affected parties required under subsection (a)(2),

(B) the requirements of subparagraphs (A) and (B) of paragraph (2) are met,

(C) the corporation does not issue a notice of noncompliance under subparagraph (C) of paragraph (2), and

(D) when the final distribution of assets occurs, the plan is sufficient for benefit commitments (determined as of the termination date).

(2) Termination Procedure. –

(A) Notice to the corporation. – As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2), the plan administrator shall send a notice to the corporation setting forth

(i) certification by an enrolled actuary –

(I) of the projected amount of the assets of the plan (as of a proposed date of final distribution of assets),

(II) of the actuarial present value (as of such date) of the benefit commitments (determined as of the proposed termination date) under the plan, and

(III) that the plan is projected to be sufficient (as of such proposed date of final distribution) for such benefit commitments,

(ii) such information as the corporation may prescribe in regulations as necessary to enable the corporation to make determinations under subparagraph (C), and

(iii) certification by the plan administrator that the information on which the enrolled actuary based the certification under clause (i) and the information provided to the corporation under clause (ii) are accurate and complete.

(B) Notice to Participants and Beneficiaries of Benefit Commitments. – No later than the date on which a notice is sent by the plan administrator under subparagraph (A), the plan administrator shall send a notice to

each person who is a participant or beneficiary under the plan –

(i) specifying the amount of such person's benefit commitments (if any) as of the proposed termination date and the benefit form on the basis of which such amount is determined, and

(ii) including the following information used in determining such benefit commitments:

(I) the length of service,

(II) the age of the participant or beneficiary,

(III) wages,

(IV) the assumptions, including the interest rate, and

(V) such other information as the corporation may require.

(C) Notice from the Corporation of Noncompliance. –

(i) In General. – Within 60 days after receipt of the notice under subparagraph (A), the corporation shall issue a notice of noncompliance to the plan administrator if –

(I) it has reason to believe that any requirement of subsection (a)(2) or subparagraph (A) or (B) has not been met,

(II) it otherwise determines, on the basis of information provided by affected parties or otherwise obtained by the corporation, that there is reason to believe that the plan is not sufficient for benefit commitments.

(ii) Extension. – The corporation and the plan administrator may agree to extend the 60-day period referred to in clause (i) by a written agreement signed by the corporation and the plan administrator before the expiration of the 60-day period. The 60-day period shall be extended as provided in the agreement and may be further extended by subsequent written agreements signed by the corporation and the plan administrator made before the expiration of a previously agreed upon extension of the 60-day period. Any extension may be made upon such terms and conditions (including the payment of benefits as are agreed upon by the corporation and the plan administrator.

(D) Final Distribution of Assets in Absence of Notice of Noncompliance. – the plan administrator shall commence the final distribution of assets pursuant to the standard termination of the plan as soon as practicable after the expiration of the 60-day (or extended) period referred to in subparagraph (C), but such final distribution may occur only if –

(i) the plan administrator has not received during such period a notice of noncompliance from the corporation under subparagraph (C), and

(ii) when such final distribution occurs, the plan if sufficient for benefit commitments (determined as of the termination date).

(3) Methods of Final Distribution of Assets. –

(A) In General. – In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 4044. In distributing such assets, the plan administrator shall –

(i) purchase irrevocable commitments from an insurer to provide the benefit commitments under the plan and all other benefits (if any) under the plan to which assets are required to be allocated under section 4044.

(ii) in accordance with the provisions of the plan and any applicable regulations of the corporation, otherwise fully provide the benefit commitments under the plan and all other benefits (if any) under the plan to which assets are required to be allocated under section 4044.

(B) Certification to the Corporation of Final Distribution of Assets. – Within 30 days after the final distribution of assets is completed pursuant to the standard termination of the plan under this subsection, the plan administrator shall send a notice to the corporation certifying that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to pay the benefit commitments under the plan and all other benefits under the plan to which assets are required to be allocated under section 4044.

(4) Continuing Authority. – Nothing in this section shall be construed to preclude the continued exercise by the corporation, after the termination date of a plan terminated in a standard termination under this subsection, of its authority under section 4003 with respect to matters relating to the termination. A certification under paragraph (3)(B) shall not affect the corporation's obligations under section 4022.

7. ERISA §4044(a)
29 U.S.C. §1344(a)

In the case of the termination of a single-employer defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity –

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending n [sic] such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as

in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth –

(A) to all other benefits (if any) of individuals under the plan guaranteed under this title (determined without regard to section 4022B(a)), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 4022(b)(5) did not apply.

For purposes of this paragraph, section 4021 shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

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8. Internal Revenue Code §411(d)(3)
26 U.S.C. §411(d)(3)

(3) Termination or partial termination; discontinuance of contributions. Notwithstanding the provisions of subsection (a), a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that –

(A) upon its termination or partial termination, or

(B) in the case of a plan to which section 412 does not apply, upon complete discontinuance of contributions under the plan,

the rights of all affected employees to benefits accrued to date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable. This paragraph shall not apply to benefits or contributions which, under provisions of the plan adopted pursuant to regulations prescribed by the Secretary to preclude the discrimination prohibited by section 401(a)(4), may not be used for designated employees in the event of early termination of the plan. For purposes of this paragraph, in the case of the complete discontinuance of contributions under a profit-sharing or stock bonus plan, such plan shall be treated as having terminated on the day on which the plan administrator notifies the Secretary (in accordance with regulations) of the discontinuance.

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9. Internal Revenue Code 411(d)(6)
26 U.S.C. §411(d)(6)

(A) In general. – A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8), or section 4281 of the Employee Retirement Income Security Act of 1974.

(B) Treatment of certain plan amendments. For purposes of subparagraph (A), a plan amendment which has the effect of –

(i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(ii) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary may by regulations provide that this subparagraph shall not apply to a plan amendment described in clause (ii) (other than a plan amendment having an effect described in clause (i)).

(C) Special rule for ESOP's – For purposes of this paragraph, any –

(i) tax credit employee stock ownership plan (as defined in section 409(a)), or

(ii) employee stock ownership plan (as defined in section 4975(e)(7)), shall not be treated as failing to meet the requirements of this paragraph merely because it modifies distribution options in a nondiscriminatory manner.

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10. Treasury Regulations. §1.411 (d)-4, Q&A6

Q-6. May a plan condition the availability of a section 411(d)(6) protected benefit on the satisfaction of objective conditions that are specifically set forth in the plan?

A-6. **(a) Certain objective conditions permissible.**

(1) In general. The availability of a section 411(d)(6) protected benefit may be limited to employees who satisfy certain objective conditions provided the conditions are ascertainable, clearly set forth in the plan and not subject to the employer's discretion except to the extent reasonably necessary to determine whether the objective conditions have been met. Also, the availability of the section 411(d)(6) protected benefit must meet the nondiscrimination requirements of section 401(a)(4). See §1.401(a)-4.

(2) Examples of permissible conditions. The following examples illustrate some of the permissible objective conditions; a plan may deny a single sum distribution form to employees for whom life insurance is not available at standard rates as defined under the terms of the plan at the time the single sum distribution would otherwise be payable; a plan may provide that a single sum distribution is available only if the employee is in extreme financial need as defined under the terms of the plan at the time the single sum distribution is available only if the employee is in extreme financial need as defined under the terms of the plan at the time the single sum distributions would otherwise be payable; a plan my condition the availability of a single sum distribution on

the execution of a covenant not to compete, provided that objective conditions with respect to the terms of such covenant and the employees and circumstances requiring execution of such covenant are set forth in the plan.

(b) Conditions based on factors within employer's discretion generally impermissible. A plan may not limit the availability of section 411(d)(6) protected benefits permitted under the plan on objective conditions that are within the employer's discretion. For example, the availability of section 411(d)(6) protected benefits in a plan may not be conditioned on a determination with respect to the level of the plan's funded status, because the amount of plan funding is within the employer's discretion. However, for example, although conditions based on the plan's funded status are impermissible, a plan may limit the availability of a section 411(d)(6) protected benefit (e.g., a single sum distribution) in an objective manner, such as the following:

(1) Single sum distributions of $25,000 and less are available without limit; and

(2) Single sum distributions in excess of $25,000 are available for a year only to the extent that the total amount of such single sum distributions for the year is not greater than $5,000,000; and

(3) An objective and nondiscriminatory method for determining which particular single sum distributions will not be available during a year in order for the $5,000,000 limit to be satisfied is set forth in the plan.